No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN, *Petitioner*,

v.

DONALD RUMSFELD, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX
VOLUME II - JA 175 - 388

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM HAMDAN, Plaintiff, v. DONALE RUMSFELD, et al., Defendants.	CV No. 04-1519

Washington, D.C.
October 25, 2004
1:06 p.m.

Transcript of Motions Hearing
Before the Honorable James Robertson
United States District Judge

APPEARANCES:

For the Plaintiff:	BENJAMIN SHARP, ESQ. CHARLES SWIFT, ESQ. JOSEPH McMILLAN, ESQ. NEAL KATYAL, ESQ.
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PROCEEDINGS

THE DEPUTY CLERK: The court is now in session. Please be seated and come to order. Civil Action No. 04-1519, Salim Hamdan v. Donald Rumsfeld, et al. For the plaintiffs, speaking will be Charles Swift, Joseph McMillan and Neal Katyal. For the defendants, Jonathan Marcus.

THE COURT: Marcus. Yes, I know.

Good afternoon. The motions that are about to be heard have a background that's pretty extensive, and there may be a number of people here who don't quite know what this is all about. So I'm going to lay out some of the background of this. I may take a little time doing this, but it will not be to the detriment of the time I've told counsel they can argue. The only sure thing is we're going to be gone at 4 o'clock. No matter what else happens, we're leaving at 4 o'clock.

I'm, also--I'm sorry to tell you this belatedly--but I have no plans to take a break between now and 4 o'clock. So, if anybody needs one, you'll just have to manage.

This case is called Hamdan v. Rumsfeld. It's Hamdan now. It used to be Swift v. Rumsfeld. It deals with a man who was captured and detained in Afghanistan in November 2001, transferred to Guantanamo Bay sometime in 2002. After that time, the president of the United States issued a finding that he had reason to believe that Mr. Hamdan is or was a member of al Qaeda or that he harbored or aided and abetted or conspired with those who were. That made Mr. Hamdan subject to trial by a military commission, and he was transferred in December of 2003 to a subset of what is at Guantanamo Bay called Camp Echo, and there he was held in isolation at Camp Echo.

Lieutenant Commander Swift, whom we will refer to in Navy fashion as Mr. Swift, was appointed counsel for Hamdan in December of 2003 and brought an action, a petition for man mandamus and/or habeas corpus in the

District of Washington; that is, that District of Washington, in April of 2004.

The case was transferred here in early September, after the 9th Circuit concluded that the Supreme Court's decision in Rasul required habeas cases to be sent to this court.

More recently, a conspiracy charge was filed against Hamdan before the military commission. He is charged with conspiracy to attack civilians, to attack civilian objects. He is charged with murder by an unprivileged belligerent. He is charged with destruction of property by an unprivileged belligerent, and he is charged with terrorism. Those are the five acts that he is alleged to have conspired to do.

Now, the authorization for all of this begins--I don't want to undercut the government's argument that it begins much earlier than this, but there was an act of Congress passed a week after 9/11/2001 called the Authorization for Use of Military Force, authorizing the president to use all necessary force to deter and prevent acts of terrorism, pursuant to which the president sent troops to Afghanistan. The hostilities in Afghanistan are still ongoing, at least that's the government's position. I don't think there will be a dispute about that. And the military determined that individuals captured during those armed hostilities were to be detained during the conflict as enemy combatants.

Then, on November 13th, 2001, the president signed a document that has come to be known as the "Military Order." The Military Order is made applicable to anyone as to whom the president determines that there is reason to believe that he is or was a member of al Qaeda or harbored or aided and abetted or conspired with members of al Qaeda, and it is that determination that I referred to earlier.

The Military Order recites, on its face, the president's authority, as the commander-in-chief, and recites his authority as vested by the Constitution and laws of the United States. We'll talk a little bit about what exactly constitutes that authority, and the authorization for use of military force

known as the AUMF, and 10 USC 821 and 836. Those code sections are actually references to Articles 21 and 36 of what is known as the Uniform Code of Military Justice.

Article 21 confers--Article 21 provides--and this will be the subject I think of considerable discussion this afternoon--that conferring jurisdiction on courts martial, as the Uniform Code of Military Justice does, does not deprive military commissions of the concurrent jurisdiction--of concurrent jurisdiction--for offenders or offenses that, by statute or by the law of war, may be tried by military commission.

Article 36 authorizes the president to prescribe rules for military commissions that, insofar as he considers practicable, must apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States District Courts, but which may not be--and we'll talk about this some today--which may not be contrary to or inconsistent with this chapter, meaning, I believe, the Uniform Code of Military Justice.

The president's military order ordered that persons subject to the order be detained and tried by military tribunals, and the president found that it was not practicable to apply principles of law and rules of evidence generally recognized in the trial of criminal cases in District Courts.

I imagine everybody here is generally aware of the two intervening and very important decisions of the Supreme Court in Rasul v. Bush and in Hamdi v. Rumsfeld. The Rasul case generally stands for the proposition that the habeas statute, 28 USC 2241, confers jurisdiction to hear challenges by aliens held at Guantanamo Bay, and Hamdi, there's a lot of writing in Hamdi, the general holding of Hamdi is that due process requires that a U.S. citizen--a U.S. citizen, which Hamdan is not--being held as enemy combatants be given meaningful opportunities to contest the factual basis for their detention.

Mr. Hamdan's suit for mandamus or habeas corpus complains of a number of things:

First, that he was denied a speedy trial, has been denied a speedy trial, in violation of Article 10 of the Uniform Code of Military Justice.

Second, that his pretrial detention has been unlawful as a violation of the third Geneva Convention, Article 103, and is a violation of 42 USC 1981, which is a Reconstruction Era statute.

Mr. Hamdan challenges the legality of the whole military commission, under Article 3 of the Geneva Convention, and as a violation of separation of powers, and as a violation of the equal protection clause made applicable under the Fifth Amendment.

Mr. Hamdan charges the military order as purporting to invest military commission with authority that exceed the laws of war.

Mr. Hamdan alleges that he was improperly designated under the military order and that there is no process to make a correct determination.

The government has moved to dismiss. The government's motion to dismiss makes a jurisdictional argument, which I believe has been mooted or conceded out of the way, although they may have an argument to be made on mandamus. I don't know about that.

I think I must put, first and foremost or front and center, the government's argument on abstention, which is an argument that I may not resolve the issues that Hamdan has brought to this Court, that I must await the outcome of the military process that Hamdan has not exhausted the remedies that may be available before the military commissions.

Turning to the merits, the government argues there is no speedy trial violation. We'll hear about that. There's no Geneva Convention violation in pretrial confinement in Camp Echo; that, indeed, for a number of reasons the Geneva Conventions don't even apply here; that there's no merit to Hamdan's equal protection claims; there's no violation of the

separation of powers. And those are the arguments that we're going to hear about today.

I will stop talking and allow counsel to argue, but not before I acknowledge, and acknowledge with considerable appreciation, the amicus curiae briefs that have been filed by a number of entities and organizations: the Washington Legal Foundation and Allied Educational Foundation supporting the government's position; the Center for International Human Rights at Northwestern University Law School and four of its professors supporting the petitioner; sixteen law professors supporting the petitioner; two hundred and seventy-one United Kingdom and European parliamentarians, making human rights and international law arguments and supporting the petitioner; and especially, I must say, although these are all excellent briefs, special mention is due to the brief of retired generals, David Brahms and Richard O'Meara and Retired Admirals Gunn and Hutson, supporting the petitioner in dealing with the Geneva Conventions.

That went by a little fast, I know, but for those of you who are listening, that's the background.

Now, I'll hear argument from, I guess, Mr. Marcus. You're the movement.

MR. MARCUS: Thank you, Your Honor. Before I get into my argument, there are just a couple of facts that I want to make sure that you are aware of; the first being we sent a notice in on Friday to the Court that Mr. Hamdan is no longer being detained or confined at Camp Echo.

THE COURT: Yes, I did get that notice. Tell me about that.

MR. MARCUS: Well, my understanding is that that happened the middle of last week, and the decision was under consideration for some time, and it was done for logistical and operational reasons.

THE COURT: Not legal reasons.

MR. MARCUS: No, not legal reasons.

THE COURT: And your notice says counsel recently learned of it. When did you--how recent is recent?

MR. MARCUS: I believe we learned about it Wednesday or Thursday of last week.

THE COURT: And was Hamdan's counsel notified contemporaneously?

MR. MARCUS: Yes, I called. After I found out, I called Mr. Hamdan's counsel, Mr. Cameron.

THE COURT: The notice says that he has been moved back to Camp Delta, but to a wing in Camp Delta that is dedicated to what the notice calls "precommission detainees." I assume that means people who have been designated for the commission, but haven't actually been commissioned, haven't been exposed to the commission, and are being detained, right? Which is, what, six people? four people?

MR. MARCUS: My understanding is that it's, I believe, six people, six individuals who are in this separate part of Camp Delta.

THE COURT: Now, how does this detention differ from the detention that the petitioner complains of in Camp Echo?

MR. MARCUS: Well, my understanding is that the commission detainees can talk, can communicate with each other. They're in open-air-type cells like they have at the rest of Camp Delta. So that's a significant difference.

THE COURT: So it's not isolation.

MR. MARCUS: No.

THE COURT: What about sunlight?

MR. MARCUS: Yes, I believe they--they're, I think they're open-air-type cells, so they're--

THE COURT: Exercise?

MR. MARCUS: My understanding is there's, I believe, two hours of that a day.

THE COURT: Free access to religious materials?

MR. MARCUS: I believe so.

THE COURT: Okay.

MR. MARCUS: And the second fact I wanted the Court to be aware of is we adverted in our reply brief to a Combatant Status Review Tribunal that was held on October 3rd. And the finding that that tribunal made has been finalized, and the tribunal did find, did confirm, Mr. Hamdan's status as an enemy combatant, as either a member of or affiliated with al Qaeda.

THE COURT: And when did that happen?

MR. MARCUS: I'm not sure of the precise date it was finalized, but the preliminary finding was on October 3rd, and then I believe a couple weeks later it was finalized.

THE COURT: Well, as I don't have to tell you, that finding is of some importance, but the record before me contains nothing about the makeup of the tribunal, the hearing before the tribunal or anything except all I have is your statement which, of course, is true, but I think you need to augment the record to explain what happened and describe what happened.

MR. MARCUS: Your Honor, if you like, we could supplement the record with the findings. Our position is it's not strictly necessary to the resolution of the issues before you. The petitioner is going to be receiving a trial before a military commission on December 7th, and so we don't believe that the Combatant Status Review Tribunal finding really should necessarily play any role in this Court's decision regarding abstention.

In the event--

THE COURT: Does the--well, let me ask you this, Mr. Marcus--does the finding have any bearing, in your view, on the question of whether or not Hamdan is entitled to POW status?

MR. MARCUS: It doesn't, in our view, because, in our view, there was, before the hearing, no doubt had arisen as to

his status. This just confirmed his status, so we don't believe it affects that determination.

THE COURT: But this doesn't even add anything to that finding. It has zero effect. In other words, if you were right about his POW status before you're still right, and if you're wrong, you're still wrong. It doesn't make any difference what happened in the Combatant Status Review Panel, right?

MR. MARCUS: For purposes of this, yes. For purposes of this hearing, this motion, that's correct.

THE COURT: Fine. And while we're getting these housekeeping matters out of the way, there is one more. The respondents argue that this really ought to be a case only against Donald Rumsfeld, the secretary of defense, and not against the president and lots of other people. I haven't heard any complaint from the plaintiffs about that or from the petitioners about that.

MR. MARCUS: You might.

THE COURT: If it's not a settled issue, we'll wait until it's your turn.

Go ahead, Mr. Marcus.

MR. MARCUS: May it please the Court, Jonathan Marcus, on behalf of respondents.

Petitioner was captured in Afghanistan during the ongoing armed conflict with al Qaeda and is scheduled to go to trial before a military commission on December 7th for an offense against the law of war. Petitioner has pressed numerous legal challenges to the president's authority to subject him to such a trial, and respondents have moved to dismiss those challenges on two alternative grounds.

First, there is a substantial military process that is now underway that should be permitted to run its course before this Court weighs in. If the Court agrees with respondents that such abstention is warranted, it should dismiss the petition without prejudice to refiling upon the completion of

the military proceedings in the event petitioner is found guilty.

THE COURT: Can I hold it in abeyance?

MR. MARCUS: I think that would be in your discretion.

THE COURT: Well, just at the outset, let me explore exactly what you mean by "abstention" here. If you agree that I don't have to dismiss, I can keep the petition--assuming I agree with your abstention argument, which we're a long way from that point, but assuming I did, would it be your position, then, that I could just put this in a stay posture and then review all of it later on after the military tribunal proceedings are over with?

MR. MARCUS: Yes, I think that is one way you could proceed. I think it would be within--

THE COURT: That's, roughly, that's a rough analogue to civilian court review of a proceeding taking place in the military. Are you comfortable with that?

MR. MARCUS: Yes, I am comfortable with that, if the Court chooses to go that route. We would be comfortable with that. There may, of course, depending on the developments in the military court, there may be a need for supplemental briefing, ultimately, depending on how things play out there, but I think that would be an option if you had a reluctance to dismiss the case without prejudice.

Alternatively, if this Court intercedes at this time, it should dismiss all of petitioner's claims with prejudice because they are meritless.

I'll begin with the abstention issue. There are three basic reasons why Councilman calls for this Court to abstain in this case.

First, there is a military commission process underway, in which petitioner can raise all of his legal challenges that he raises here. In fact, he has raised all of the same challenges in the military commission that he has raised here. Motions have been filed, and the military commission is scheduled to

hear argument on the motions, as I understand, in early November.

Contrary to petitioners' claims, there is no reason to believe that the military commission process is stacked against him. Although it is not a matter of the Court record, it is a matter of public record that the appointing authority issued an opinion last week in which it granted, in part, the petitioners' motion to remove some of the Commission members on the ground that there was reason to doubt whether they could be impartial

The appointing authority's opinion is 28 pages long, and it canvasses both federal court law and international law standards in determining, in concluding that three of the commission members had to be removed.

In addition, contrary to petitioner's suggestion and that of their amici, the regulations that have been issued pursuant to the president's military order provides substantial protections to petitioner, including notice of the charges in advance of trial, presumption of innocence, a finding of guilty only upon proof beyond a reasonable doubt, pretrial access to both inculpatory and exculpatory evidence, the right to--the opportunity to call witnesses that are reasonably available in his defense, the right to cross-examine prosecution witnesses.

THE COURT: Hold it. Back up a minute. Say again about the right to call witnesses.

MR. MARCUS: There's an opportunity, there's a right to call witnesses that are reasonably available.

THE COURT: "Reasonably available" is the operative term here, I think.

MR. MARCUS: Right, and that will be subject to interpretation and application by the military commission.

In addition, he's entitled to a public trial, to the maximum extent possible, and he is entitled to present evidence before a sentencing proceeding.

In addition, there are several layers of review, including by a review panel that is comprised of both former and current state and federal judges and a former transportation secretary, who has been a longstanding member of a Washington law firm.

Given that there is a substantial process that provides substantial protections to Mr. Hamdan, there is no reason to conclude that legal relief is not available in the military commission, in addition to the fact that there is always the prospect that he'll be acquitted, in which case, all the legal claims he's filed in this action will be mooted.

The second reason this Court should abstain is it's primarily the province of the military, which is on the front lines of this armed conflict, to enforce the laws of war.

The main fact that distinguishes this case from Councilman that a military commission has been convened to try an alien enemy combatant for an offense against the laws of war does not council in favor of court intervention. To the contrary, under the Constitution, the president bears the responsibility for protecting the nation from foreign attack and for determining the most effect manner in which to wage the war, including the manner in which to hold enemy combatants--including the manner in which to hold the enemy accountable for targeting Americans for mass death.

These circumstances surely call for this Court's restraint just as much as the situation in Councilman, where the Court was concerned about interfering with the military's need to enforce discipline.

Third, petitioner simply has no right to pretrial federal review of its claims. Petitioner suggested he is so entitled because his claims are jurisdictional in nature, but in Councilman itself, the Court rejected that argument and found that the fact that the petitioner in that case who was seeking to challenge jurisdiction was not a basis to abstain.

Petitioner relies on cases such as Reid v. Covert and Toth v. Quarles, but those cases are in apposite. In those cases, the challenges to military jurisdiction were made by U.S. citizens who were indisputably civilians. By contrast, petitioner here is an alien enemy combatant who is charged with the violation of the laws of war.

THE COURT: Mr. Marcus, what I have been looking to, and you can teach me if I'm off-base here, what I've been looking to is a decision that's a little closer to home and closer in time than Councilman, and it's New v. Cohen, which is circuit precedent here. And that case emphasizes that what we're really talking about here is not exhaustion, but comity between two fully grown court systems' query whether the tribunals in Guantanamo Bay are fully grown systems of the kind as to which comity is, whether indeed it is a separate judicial system. And New v. Cohen also articulates what I think it calls a simple rule; that a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over it.

That's circuit precedent; is it not?

MR. MARCUS: Well, I think it has to be interpreted consistently with Councilman, and there are several parts to the Court's decision. With respect to the comity point, I believe that, in this situation, as I mentioned earlier, given that the president has set up these commissions pursuant to his war powers during a time of war, it seems to me that, while it's a military commission system, military commissions have been set up by the commander-in-chief going back to the beginning of our nation, and they're entitled to similar comity respect.

THE COURT: Court-to-court comity is different from court-to-executive comity. Would you not agree with that?

MR. MARCUS: I would agree that there might be a distinction there, but again I think that there are reasons why, equally compelling, in this circumstance, for the Court to abstain.

THE COURT: Well, what about this from Councilman, which distinguished Reid, and McElroy and Toth as ones raising--and this is Councilman-- "substantial arguments denying the right of the military to try them at all"? Don't I at least have to determine whether there is a substantial argument here?

MR. MARCUS: That is part of the standard, although, again, I wouldn't concede that it necessarily applies, when you're talking about someone who is an alien enemy combatant who is being held outside of the United States. But if the Court is going to consider that, I think, in light of at least three Supreme Court precedents upholding the president's authority to convene military commissions during a time of war, and it's repeated statements that the president has the authority and that the military commissions have jurisdiction over enemy combatants charged with violations of the law of war, the petitioner has not made a substantial challenge to the jurisdiction of the Court.

We can get into some of the merits here. While he has sort of several reasons why those Supreme Court cases are distinguishable, the very fact that there are three Supreme Court precedents that, while not exactly the same, don't present exactly the same circumstances as this case, do present similar circumstances, certainly, those three precedents--Quirin, Yamashita and Eisentrager--certainly weigh heavily against an argument that the military commissions in this case don't have jurisdiction. After all, the president modeled these military commissions--

THE COURT: Well, but now we're onto the merits, which is fine with me.

MR. MARCUS: I'll go back. Can I go back and finish my presentation on abstention?

THE COURT: Yes, sure.

MR. MARCUS: And then we can get more into the merits.

Finally, petitioner has not shown--Councilman requires an extraordinary showing of irreparable harm. There are other decisions that talk about a showing of bad faith or harassment. Petitioner has not made any showing of that nature. He has claimed and pointed to the declarations he has submitted that there was a risk of mental harm stemming from his stay at Camp Echo, where he no longer is, but he has not presented any evidence that Hamdan has, in fact, suffered mental harm, and he's free, of course, to present any kind of claim of that nature to the military commission which can address it in due course.

THE COURT: His counsel will stand up and say, "Well, Judge, I would do it today, but you issued an order saying we're not going to hear any testimony or take any evidence at this hearing," so we'll just have to leave the record where it is on that subject.

All right, sir, go ahead.

MR. MARCUS: So, for all of those reasons, first, that there's a military commission process underway that does provide petitioner substantial petitions that I listed before;

Secondly, that it is primarily the province of the military to enforce the laws of war, to enforce the limits on belligerent conduct;

And, third, because petitioner, as an alien enemy combatant held outside the United States, does not have any right to pretrial federal review of its claims, this court should abstain.

Now, moving on to the merits. The first issue is the speedy trial claim. There are four reasons why this claim is meritless.

First, the provisions of the Uniform Code of Military Justice governing courts martial do not apply to military commissions. The Uniform Code of military justice recognizes the jurisdiction of military commissions in Article 21, but does not purport to regulate comprehensively their

procedures. The Supreme Court held as much in both the Yamashita case and the Madsen case. In both cases, the Court describes the hands-off approach that the Congress has taken towards military commissions.

Now, Article 36 gives the president discretion to establish procedures and provides that those procedures should not be "contrary to or inconsistent" with the Uniform Code of Military Justice. It is our position that the absence of a speedy trial clock in the military commission proceedings is not contrary to or inconsistent for two reasons, inconsistent with the UCMJ, for two reasons:

First, Article 10 regulates detention that is the product of a criminal charge, not detention that's authorized on an independent basis. In this case, Petitioner Hamdan has been held all along on an independent basis that he's an enemy combatant since the time of his capture.

THE COURT: But by that logic, if there was, if there is a speedy trial clock, your position would be it began to run when the conspiracy charge was applied.

MR. MARCUS: That's correct.

THE COURT: Was brought.

MR. MARCUS: That's correct.

The second reason it's not inconsistent is that the very circumstances in which military commissions are convened calls for a level of flexibility that justifies departure from speedy trial rules. After all, the commissions are convened during a time of war, a time when your evidence is being collected on the battlefield, and there are a lot of resource allocation issues. And so, for all those reasons, there's no reason to conclude that military commissions that don't apply the same speedy trial clock that the courts martial do are necessarily inconsistent with them

As a result of construing Article 36 rigidly to mean that there can be no deviation from the UCMJ, would affect--which is what petitioner's position essentially is--would have

resulted in having virtually all of the UCMJ provisions apply to the military commissions, which would clearly be in conflict with historical practice, as recognized by the Supreme Court, in both Yamashita and Madsen, and also inconsistent with Congress's intent, as reflected in Articles 21 and 36, and other provisions of the UCMJ that specifically mention commissions when a particular rule applies to them.

THE COURT: Is there any time limitation at all on these military commission trials?

MR. MARCUS: At this point, I'm not aware of one. The military commission would have the authority to establish such a rule if it believed that was--

THE COURT: What would they use as the source of the jurisprudence if they decided, well, this is too long. You say it's not the Uniform Code of Military Justice. Would it be, by any chance, the Geneva Conventions?

MR. MARCUS: Judging from the decision that was issued last week, I would imagine they would look to all sources. They would look to federal law. They might look to international law standards to establish a clock.

Now, even if the Article 10 applies here, it does not--

THE COURT: Excuse me. Is there an active motion before the military commission to dismiss on speedy trial grounds?

MR. MARCUS: There is, Your Honor.

THE COURT: All right.

MR. MARCUS: Even if Article 10 does apply, it does not apply to most of the time period that petitioner is complaining about. Petitioner focuses his complaint on the time that elapsed from capture until the time that he was charged. But, again, during that time he was being detained as an enemy combatant, because there's an independent basis for his detention, Article 10, which on its face is triggered by an arrest or confinement related to a criminal charge, does not apply to the time period about which he complains.

Even assuming Article 10 does apply to his precharge detention, petitioner has not met his burden of showing the military failed to act with reasonable diligence.

Judging from federal cases on speedy trial, the amount of time that's elapsed in this case is not excessive, given the nature of the charges. I mean, after all, this is a conspiracy charge. The charge alleges a conspiracy that would span five years, involving al Qaeda, an international terrorist organization that is spread throughout the world, that it operates in a highly secretive fashion, a highly disciplined fashion and is fanatical in nature.

Therefore, for all of those reasons, we do not believe that petitioners have remotely made out a claim that the military did not act with reasonable diligence here.

Finally, they failed to show any prejudice. Their claims for prejudice at this point are totally speculative. There hasn't been a trial yet. There is no basis to evaluate, at this time, whether petitioner has been prejudiced in any way by the alleged delay.

Moving on to the Geneva--

THE COURT: But as we have earlier agreed with one another, if I were to abstain and hold this matter under advisement, prejudice could be shown post-trial.

MR. MARCUS: It certainly could be--

THE COURT: If there were any.

MR. MARCUS: Yes, if there were any because that could be a time when it could be evaluated.

Moving on to the Geneva Conventions. There are four reasons here, too, while petitioners claimed reliance on the Geneva Conventions as meritless--

THE COURT: Lawyers like to do that, don't they? Three reasons, four reasons--

[Laughter.]

THE COURT: All right, four reasons. Go ahead. Number one.

MR. MARCUS: First, number one, the Geneva Conventions are not self-executing. The Supreme Court in Eisentrager interpreted the 1929 precursor to the GPW and held that it did not, that it was not self-executing and that it contemplated only diplomatic means of enforcement. There is nothing in the plain language of the 1949 GPW or in the legislative history to suggest a dramatic shift or sea change from diplomacy to an enforcement mechanism by which enemy detainees can hold the enemy government to account in its own courts.

THE COURT: Did there have to be a sea change? Doesn't the--don't the Geneva Conventions of 1949 stand on their own bottom, so to speak?

MR. MARCUS: They do, but given they were based on, and some of the provisions are very similar to the 1929 provision, you would imagine that you would see some language suggesting a clear departure, but what you do see is actually a language that's very similar.

If I could point to the language in the Geneva Convention and the enforcement provisions. In Article 132, in particular, provides that "At the request of a party to the conflict, an inquiry shall be instituted in a manner decided between the interested parties concerning any alleged violation of the convention. If agreement has not been reached concerning the procedure for the inquiry, the parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the parties to a conflict shall put an end to it and shall repress it with the least-possible delay.

There are other provisions, such as Article 11, that similarly contemplate diplomatic enforcement. And there is no language in the convention that indicates an intent to have enforcement at the instance of enemy detainees.

In addition, the violation that they're essentially alleging, that he won't receive or that he's been willfully deprived of a

fair trial would be considered a grave breach under Article 130 of the GPW.

THE COURT: The only way you get to Article 130 is by plugging the word "willful" in there, Mr. Marcus, I think. I mean "grave breach," excuse me, but you're about to make the same mistake that Judge Bork made. I can say that now, since he's not sitting on the Court of Appeals any more.

[Laughter.]

THE COURT: Article 129 has provisions for enactment of additional penalties for grave breaches. I don't hear the plaintiffs asserting--I'll certainly talk to them about this--I don't hear the petitioners saying we're talking about a grave breach, which is murder, torture, medical experiments, and that sort of thing which are covered by 129. You don't really think that this is that kind of a situation.

MR. MARCUS: It's an additional point that shows that, at least with respect to those provisions, what the parties contemplated was penal legislation, criminal legislation, that the parties would enact that, again, would leave it to the political branches for enforcement.

So just between those and the other enforcement provisions that I've referred the Court to, there is simply no indication that this treaty was intended to be self-executing nor is there anything in the legislative history to that effect.

THE COURT: Would you say that the third Geneva Convention prescribes rules by which rights of a private citizen may be determined?

MR. MARCUS: Prescribes rules by which rights--

THE COURT: The rights of a private citizen may be determined?

MR. MARCUS: I would say that the rules that it prescribes are for the, according to the language, is for the parties to get together and decide on a method to determine whether, in fact, someone's rights have been violated.

THE COURT: But they certainly are rights that apply to individuals, are they not?

MR. MARCUS: Yes. Yes.

THE COURT: Are you going to go on to talk about private right of action as a different topic from self-executing or do you think it's all in the same thing?

MR. MARCUS: Well, it's our position that, I mean, what the Courts mean by self-executing or nonself-executing is whether they are judicially enforceable rights, whether the rights can be enforced by courts against the political branches.

THE COURT: Okay.

MR. MARCUS: And that that seems clear from the Supreme Court's recent decision in the Sosa case, which talked about the ICCPR being nonself-executing and explained that what that meant was it couldn't be judicially enforced against the political branches.

Secondly, even if this Court determines that the conventions are self-executing, the President has determined that the Geneva Convention does not apply to the armed conflict with al Qaeda. And that determination, coming from the agency charged with the enforcement of the treaty, under well-established law, is entitled to great weight. That's especially so here, given that the president is exercising his core responsibility for executing the foreign policy of the United States and his core responsibility as commander-in-chief to successfully prosecute the war against al Qaeda.

If petitioners get past those two obstacles, the provisions they rely on are facially inapplicable in any event.

THE COURT: Well, let's stick with the second obstacle for a little bit. Hamdan was captured in Afghanistan, right?

MR. MARCUS: Yes.

THE COURT: During the course of a conflict with Afghanistan, right?

MR. MARCUS: Correct.

THE COURT: Afghanistan is one of the High Contracting Parties to the Geneva Conventions, right?

MR. MARCUS: Correct. We're not disputing that.

THE COURT: So the president has found that the Geneva Conventions don't apply to anybody captured or only to al Qaeda people or only to Taliban people?

MR. MARCUS: The president has made the determination that the conventions do not apply to al Qaeda.

THE COURT: But it does apply to Taliban.

MR. MARCUS: I believe the president did make that determination.

THE COURT: How does he know the difference?

MR. MARCUS: How did he make the--well, I think, I mean, one of the reasons is, if you look at Article 2, and the provisions in Article 2, none of those provisions would apply to the conflict against al Qaeda. Petitioner relies on the part of Article 2 which provides that "The conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party." And it is our position that the government of the United States has never totally or partially occupied Afghanistan.

THE COURT: Yes, but I guess my question is, it has something to do with the facts in the case. I mean Hamdan has asserted that he's a civilian. All we really know about him is where he was arrested, and roughly when, and I guess we know by whom not by he was, at least the petitioners say that he was captured by bounty hunters and turned over to the authorities. Is that all correct, as far as you know?

MR. MARCUS: We don't have evidence in the record on the circumstances of his capture so I'm not in a position to comment on that.

THE COURT: You've got to be certain that he's al Qaeda before you can put him in the pigeon hole that the president has established for al Qaeda people. And my question is how can you be that certain when--who's made a

finding and on the basis of what evidence that he's al Qaeda, and therefore not Taliban, and therefore not able to enjoy the benefits of the Geneva Convention?

MR. MARCUS: Well, maybe a Combatant Status Review Tribunal will play a more significant role on that point than I thought. The Combatant Status Review Tribunal did make a finding that he's a member of or affiliated with al Qaeda. So, for purposes of that argument, with respect to the Geneva Conventions, I suppose if the Court wanted to take that into account, we could supplement the record on that point if--

THE COURT: Well, before the Combatant Status Review Panel, what was the basis of that finding--just the president's determination?

MR. MARCUS: That's correct. But moving on, even assuming that the conventions are self-executing and do apply to petitioner, Article 103 is facially inapplicable to him because it applies only to prisoners of war and, as I mentioned before, no doubt ever arose as to his status as a prisoner of war.

THE COURT: No doubt ever arose in whose mind?

MR. MARCUS: Well, we believe that's the appropriate standard. It's not just a question of what the petitioner asserts. That doesn't create a sufficient doubt, in our view. And, in fact, the Army regulations appear to draw a distinction between the assertion of prisoner of war status and the existence of a "doubt."

THE COURT: It's basically the government's position, isn't it, that the president's findings here are not reviewable.

MR. MARCUS: Well, ultimately, we would--yeah, it's our position that they would be entitled to extraordinary deference. I mean, historically, courts have always deferred to the president's war powers, as exercised against alien enemy combatants outside the United States, and so it is our position

that there would be, if not total deference to those findings, extraordinary deference.

In any case, even if Article 103 was held to apply to petitioner, it's not at all clear, and the petitioner hasn't explained how it necessarily would confer an immunity from trial. There's nothing--

THE COURT: Well, we'll get to that in a minute. But has Hamdan not asserted that he is entitled to POW status?

MR. MARCUS: Yes, he made that assertion.

THE COURT: And the Army regulations still apply, do they not, at least to Army situations? Don't the Army regulations say that a detainee's status is in doubt when he claims POW status?

MR. MARCUS: I don't believe it's worded that way exactly. I believe that it makes a distinction between there being an existence of a doubt and a mere assertion. Now, the Army regulations do provide, if there is an assertion by the prisoner, that he's entitled to that status, that a hearing would be conducted and, in fact, a hearing has been conducted in this case.

THE COURT: Is that the Combatant Review Panel hearing that you're talking about?

MR. MARCUS: Yes.

THE COURT: The one that you said earlier didn't add or detract from your position?

MR. MARCUS: Well, it supplements the findings that it made several times along the way, that he was an enemy combatant. I mean, there were previous determinations in determining to send him to Guantanamo in the first place, but it does supplement that. And to the extent the Court believes it's that kind of hearing that's required by the Army regulation, it was provided, and there's nothing in that regulation that requires that he be given or accorded prisoner of war protection before that hearing is provided.

THE COURT: Mr. Marcus, go ahead.

MR. MARCUS: Unless the Court has more questions about Army Regulation 190-A, I won't spend much time on it because, regardless of whether it's enforceable, there's nothing in it that would suggest that he would have an immunity from trial as a result of any alleged violation.

Now, moving to his equal protection claim--

THE COURT: Before we leave the Geneva Convention--

MR. MARCUS: Oh, I'm sorry.

THE COURT: --talk to me about General Article 3 or Common Article 3.

MR. MARCUS: Thank you, Your Honor. I wanted to get back to that.

Before explaining why Common Article 3 is inapplicable, I want to make it clear that it's our position that the military commission fully complies with that article which does not spell out, in any detail, what procedures are required. It's worth pointing out that GPW Article 84 calls for prisoners of war to receive a military court trial, and in Article 105, it sets out the protections that a prisoner of war should receive in such a trial.

If you look over the provisions in Article 105, I think you'll find that the protections there are similar to the protections that petitioner will be receiving in his military commission trial. Given that Article 3 is intended to provide baseline protections where the other provisions don't apply, I believe it would be unreasonable to read Article 3 to impose more stringent standards than Article 105.

THE COURT: Well, the one I'm focused on, under Common Article 3, is--I lost my piece of paper here--is the one that basically says that you've got to have the same sort of trial that everybody else gets. You have to have a court martial.

MR. MARCUS: In Article--I'm sorry--in Article 3?

THE COURT: "Prohibited act to pass sentence without previous judgment pronounced by a regularly constituted court."

Your position is that the military commission is a regularly constituted court for purposes of Common Article 3; is that right?

MR. MARCUS: Yes, that's right.

THE COURT: All right.

MR. MARCUS: And we think all of the protections that are provided by the regulations will support that determination.

THE COURT: Finally, Common Article 3 is facially inapplicable as well because it applies only towards an international character. Petitioner appears to argue, recognizing that it is facially inapplicable, petitioner argues that Common Article 3 has attained the status of customary international law. And even if it has, with respect to the treatment of terrorist groups, which we don't concede, the Paquete Habana case makes clear that customary international law will not trump a controlling executive act as here the president's military order.

THE COURT: Okay.

MR. MARCUS: I think that covers the Geneva--

THE COURT: You're not basically quarreling with the proposition that Common Article 3 is passed into customary international law or that it is a minimum yardstick and gives voice to elementary considerations of humanity. You buy all that?

MR. MARCUS: Well, I don't know--we don't necessarily agree that with respect to conflict with terrorist organizations that it has established that, that it has attained that status or the practice of--there's been a consistent practice out of an obligation, out of an obligation to law that the body of, you know, a large body of the world's countries adheres to with respect to terrorist organizations.

THE COURT: All right, sir.

MR. MARCUS: But, again, even assuming that it does, the president's executive act would trump that standard.

Moving to petitioner's equal protection claim. Petitioner's equal protection claim is barred by Supreme Court precedent. Under United States v. Verdugo-Urquidez, petitioner, as a nonresident alien, cannot invoke the equal protection component of the Fifth Amendment because he has no voluntary contacts with the United States much less substantial ones. In Verdugo, a nonresident alien, present in the United States for trial, invoke the equal protection component of the Fifth Amendment to challenge a search of his Mexican residence.

The Supreme Court rejected defendant's claim, holding that history and case law were against him and that the result of accepting his claim would have significant and deleterious consequences for the United States.

In rejecting the claim, the Supreme Court relied on Eisentrager's rejection of the notion that Fifth Amendment protections extend to nonresident aliens, like petitioner, who engage in hostilities against the United States.

Contrary to petitioner's contention, those cases have not been overruled by Rasul. That case dealt exclusively with the question whether the habeas statute conferred on federal courts statutory jurisdiction to review habeas petitions filed by aliens outside the United States. That holding says nothing about the substantive constitutional rights to which nonresident aliens held at Guantanamo would be entitled.

Footnote 15 of that decision is not to the contrary. Footnote 15 simply refers to the jurisdictional requirements in Section 2243 of Title 18 regarding habeas corpus actions. In any event, even if Footnote 15 is read as an intent to extend the Constitution to some extent at Guantanamo, petitioners' claims to constitutional protections would still be

quite weak because he has no voluntary contacts with the United States, as I mentioned before.

Even assuming he could raise a claim under the equal protection component of the Fifth Amendment, his claim--

THE COURT: Is the term "voluntary" all over those cases or is it "significant contacts"?

MR. MARCUS: Well, in Verdugo Urquidez, the Court specifically said that involuntary contacts do not constitute substantial contacts.

THE COURT: You're right. Okay.

MR. MARCUS: Assuming he could raise such a claim, it would fail in any event. The president determined that in order to protect the United States, it was necessary to establish military commissions to try noncitizens captured in the ongoing armed conflict for offenses against the laws of war. That decision is an exercise of the president's war powers vis-a-vis alien enemies and implicates the most sensitive national security and foreign policy concerns.

As such, that decision is entitled to extraordinary deference. Given that the--I'm quoting from Eisentrager--

THE COURT: He only has to have a rational basis, doesn't he? He doesn't need extraordinary deference.

MR. MARCUS: Well, he's entitled to extraordinary deference and, under a rational basis standard, given that executive power over enemy aliens has been deemed, throughout our history, essential to wartime security, the president's decision was undoubtedly an inherently irrational one.

THE COURT: No questions. Go on.

MR. MARCUS: Separation of powers. The president has the inherent power to establish military commissions--

THE COURT: I'm not sure your voice is, over this fan, I'm not sure you can be heard very well. If you would put that microphone up a lot closer to your mouth--

MR. MARCUS: I'm sorry.

THE COURT: --and talk a lot louder. There a lot of people that are very interested in every word you have to say.

MR. MARCUS: The president has the inherent power to establish military commissions, but there's no need for this Court to reach that issue because the Supreme Court has repeatedly held that Congress has recognized and approved the president's use of military commissions as he deems necessary.

First, when the president issued the military order, he invoked not only his authority as commander-in-chief, but also the authority granted him by Congress and the authorization to use military force and the authority Congress recognized he has in Articles 21 and 36 of the UCMJ to convene military commissions.

The Supreme Court has ruled in no less than three decisions--Quirin, Yamashita and Madsen--that Congress has recognized and approved the president's use of military commissions to try offenses against the laws of war by virtue of the very provision of law, Article 21 of the UCMJ, that the president invoked in his military order.

Petitioner's attempt to avoid these weighty precedents lack merit.

First, petitioner claims that there's a difference here because there's an absence of a formal declaration of war. That is not a meaningful distinction in this case. As the Hamdi plurality ruled, the authorization to use military force triggered the president's war powers, including his power to detain enemy combatants. There is no basis to draw distinctions between the president's war power to detain enemy combatants and his war power to punish violators of the laws of war. In fact, the Hamdi court specifically quoted Quirin for the proposition that the detention and trial of unlawful enemy combatants is an important incident of the president's war powers.

Each of these powers clearly is equally important. As Justice Douglas explained in his concurring opinion in Hirota, the war power includes the power to punish enemies who violate the law of war, and punishment is an essential part of the prosecution of a war because it goes to the dilution of enemy power and the retribution for wrongs done. The plurality's ruling, therefore, reflects the longstanding principle that the president's prerogative to exercise his war powers does not turn on a formal declaration.

Moreover, the UCMJ provisions that the president invoked do not require a formal declaration. Apart from the absence of any such language, those provisions embody congressional recognition of authority the president has previously exercised in prior wars, including in undeclared wars.

Contrary to petitioner's contention, the Quirin precedent has not been eroded. In fact, as I just mentioned before, the Hamdi court invoked Quirin and said it was the most apposite precedent.

The war crimes statutes the petitioner cites also do not displace the traditional jurisdiction of the military commissions. The legislative history specifically refers to the jurisdiction of military commissions and the intent of Congress not to displace them. There is also a statute that was enacted four years ago--approximately four years ago--18 USC 3261(c), which makes clear that military commissions continue to retain jurisdiction to try offenses against the laws of war.

Petitioner also claims that the military commission is not in a theater of war or occupied territory, and therefore is unlawful. While there might be such a requirement for other types of military commissions that exercise broad jurisdiction over a civilian population, the one here, like the one upheld in Quirin, has a far narrower jurisdiction only to prosecute violations of the laws of war.

In Quirin, Washington, D.C., was not a theater of war, and the Supreme Court has repeatedly emphasized the flexibility the president has to convene military commissions during wartime to address the need that called them forth. In the present conflict, where al Qaeda has made the entire world its battlefield by conducting attacks in numerous countries, there's no inherent reason why the commission convened to try al Qaeda fighters need be located in a traditional theater of war.

Finally, petitioner challenges the subject matter jurisdiction of the military commission on the ground that conspiracy is not an offense against the laws of war. That is incorrect. Conspiracy offense has been treated as an offense against the laws of war in prior armed conflicts, including the Civil War and World War II. Indeed, conspiracy offenses were pursued in the Quirin and COLPA cases, and in neither case were the charges invalidated.

Contrary to petitioner's suggestion, there has not been a trend away from treating conspiracy and analogous conduct as a violation of the laws of war as the sources on Page 24 of our reply brief made clear.

It is also worth pointing out that a District Court in this district recently found that a military commission has jurisdiction over someone charged with being an accessory to a conspiracy to assassinate President Lincoln. That case was Mudd v. Caldera, 134 F. Supp. 2d 138.

THE COURT: But that was Judge Friedman writing about the historical effect of something that happened 150 years ago.

MR. MARCUS: Right. But it's an indication that historically conspiracy--

THE COURT: Accessory to conspiracy. I'll have to speak to him about that.

[Laughter.]

MR. MARCUS: For all of these reasons, if the Court chooses not to abstain, it should dismiss the legal claims with prejudice.

THE COURT: Back to separation of powers for a minute.

MR. MARCUS: Yes.

THE COURT: Where does this power of the president come from? Not just history.

MR. MARCUS: The power of the president to convene military commissions?

THE COURT: Yes.

MR. MARCUS: It comes from his commander-in-chief powers which, as I mentioned before, as Justice Douglas talks about, the war powers--

THE COURT: But is there a constitutional tag for it?

MR. MARCUS: Yes, I would say the tag is the commander-in-chief clause of Article 2.

THE COURT: What about Article 1, Section 8, I thought there was a case here someplace to the effect that this is a very limited and extraordinary power derived from the cryptic language of Article 1, Section 8, of the Constitution. You don't know about that.

MR. MARCUS: The president's powers derived from that?

THE COURT: Yes, the president's powers to convene military tribunals.

MR. MARCUS: Under Article 1, I would imagine that's an example where the Congress is given certain authorities under Article 1, but the president has his own authorities under Article 2, and, historically, the president and our country has exercised his authority, under Article 2, to convene military commissions without--

THE COURT: So because the president has done it historically and the Supreme Court has sanctioned it, that's it.

The commander-in-chief, number one, I'm commander-in-chief; number two, I did it; and, number three, the Supreme Court agreed with me, so that's my inherent authority; is that your argument?

MR. MARCUS: Well, and, number four, that it's reasonable to interpret the commander-in-chief powers to include the power to punish war criminals. After all--

THE COURT: We'll assume that's part of the Supreme Court's opinion saying it's okay.

MR. MARCUS: Yes.

THE COURT: All right. But is that power limited by Article 21?

MR. MARCUS: I don't believe the power is limited by 21.

THE COURT: Not limited to offenders or offenses that by statute or law of war are triable by military commissions?

MR. MARCUS: Right. That provision has been interpreted to, I mean, the Congress essentially recognized the president's authority to convene military commissions and has approved their use for--

THE COURT: Within those limits.

MR. MARCUS: For those purposes. That's correct.

THE COURT: So it is the law of war that applies here and, if anything, circumscribes the power of the president, it's the law of war. It describes the offenders or offenses that are triable by military commissions. Will you agree with that?

MR. MARCUS: That's what 821--that's correct--that's what 821 refers to as the law, it refers to the offenses that are defined by the laws of war. That's correct.

THE COURT: Are the Geneva Conventions part of the law of war?

MR. MARCUS: Yes, I would say the Geneva Conventions are also part of the law of war not referenced in

821. I don't think Section 821 refers to procedural protections.

THE COURT: Or in Quirin and Yamashita since they weren't in existence when Quirin and Yamashita were decided.

MR. MARCUS: No, that's correct, but essentially the same, I mean, the same provision, the same article, Article 15 of the Articles of War is identically worded to, is identically worded to Article 21 of the UCMJ.

THE COURT: Right.

MR. MARCUS: And the Madsen case, also, was decided after the UCMJ was enacted, although I believe it was interpreting provisions, the Articles of War provisions, but it was, the Court in Madsen was aware of the UCMJ.

THE COURT: All right, sir.

MR. MARCUS: Thank you.

THE COURT: Mr. Marcus, thank you very much.

MR. MARCUS: I reserve the rest of my time. I don't know. Do I have any time left?

THE COURT: Sure. You've got about 10 minutes left. No, you've got more than that. You've got about 15 minutes left.

MR. MARCUS: Thank you.

THE COURT: Professor?

MR. KATYAL: Thank you very much, Your Honor. What I'd like to do is begin with those preliminary matters that you had asked us to address, and then, the first and foremost issue you said was abstention, so I'll start there and then move to the constitutional matters. Commander Swift will then address the military law and the Geneva Convention issues, the Uniform Code of Military Justice.

The two points--as I understand the Court's order, the new evidence, like what happened on Friday, with the movement of Mr. Hamdan, where the CSRT are not at issue

in this proceeding. We don't really know or understand the conditions of Mr. Hamdan's confinement. The Friday notice of change in circumstances didn't tell us whether he is in or out of solitary. He may be in solitary in Camp Delta. We don't really fully understand whether he has access to sunlight, religious materials, all the other questions Your Honor asked. So, at this point, we can't really address his conditions of confinement.

With respect to the CSRT, we have not--

THE COURT: Excuse me. I want to assure Mr. Marcus that the fact that the fan just stopped, so that everybody can hear this next speaker, was not conspiratorial.

[Laughter.]

THE COURT: It's just the GSA.

Go on, Professor.

MR. KATYAL: With respect to the Combatant Status Review Tribunal, we haven't heard the results until this moment that he has been denied or he has been labeled an enemy combatant. We were actually barred participation before that Combatant Status Review Tribunal. We asked to be part of it, and we were barred.

We were also barred from presenting exculpatory evidence in that proceeding. We had evidence showing that Mr. Hamdan was not an enemy combatant and, as I understand it, that was not permitted.

Indeed, what was permitted was a letter from Commander Swift. He wrote to Mr. Hamdan saying things like, "Don't talk to this tribunal because I'm not allowed to be there." That evidence was--that letter to Mr. Hamdan, as I understand it, was read into the tribunal proceeding itself, even though Commander Swift was told that this would be attorney-client and protected as such.

So, at this moment in time, Your Honor, it's very hard for us to really assess the implications of the CSRT, and we believe that your order bars really discussion of that.

With respect to the question of Secretary Rumsfeld and who can be sued, we didn't address that because, as I understand it, it was only in the reply brief of the respondents to dismiss President Bush and the other respondents. If we were to address it, I think our position would be that President Bush should remain as a defendant in this lawsuit because, after all, it is his presidential order that is at issue here hat we are challenging, as well as his July 3rd, 2003, determination that Mr. Hamdan is subject to the tribunal so it makes it--

THE COURT: Do you need him in for the theater of it or because you really need him? I mean, all the cases say you get to the president through his Cabinet officers.

MR. KATYAL: If that's fine, then that's fine. We have tried very hard not to create a theater throughout April on, and so if it's the position that we can accomplish all the relief we seek, then we're fine. We're moving him and just having Secretary Rumsfeld, for whatever theatrical value that has.

Thirty-five months ago, Your Honor, Mr. Hamdan was captured and sold for a bounty to American agents. He's been detained by the United States since that time. The issue today is not a challenge or even a question as to the president's power to detain enemy combatants. Rather, it's a challenge to the decision by one man to set up a system that retrospectively assess guilt or innocence and imposes terms of life imprisonment.

This is a case where the president is acting as a prosecutor, lawmaker, jury, judge, jailer, and sentencer. It is an absolutely uncabined arrogation of power to the president. And the military commission here is a commission in name only, and just calling a body a commission does not make it so. For the first time in our history, a military tribunal is looking down at a man, while sitting far from the battlefield, set up by the unilateral authority of the president at a time when war has not been declared, with judges that are hand-picked by the secretary of defense in a selection process

without transparency, with offenses that are defined by a Pentagon staffer in a process that violates basic principles of military justice as set out by the Congress, and it's a proceeding that they say is to enforce the laws of war, on the one hand, and on the other hand, they turn around and say they are not bound by those very laws of war, like the Geneva Conventions and the like. All of this process is taking place over three years after he has been captured and is against a person who contests the status as an enemy combatant.

Accordingly, we're asking this Court to grant the petition and declare the presidential order and its accompanying procedures unconstitutional. And violations of the laws of war can be tried, as Your Honor indicated before, in courts martial proceedings. There's an explicit statute, 10 USC 818, which grants to courts martial the ability to try violations of the laws of war.

Moving to the abstention matter. The general principle is that abstention is disfavored. The federal courts are to exercise their jurisdiction and that the lack of--and that abstention is the rare exception. The D.C. Circuit, in the 1996 case of Bridges, quoted numerous Supreme Court cases to this effect. Indeed, abstention is only required when Congress has specified as such, and in Councilman itself, there was a debate about Article 76 of the Uniform Code of Military Justice and whether that required abstention. And the Supreme Court there said it is highly relevant because, after all, we're talking about a court martial system, a full-grown system of military justice in which Congress has said that court martial determinations should be final.

In commissions, by contrast, we have Attorney General Biddle standing up on the very first day of the military commission in World War II in Quirin and saying that these matters, the ones that Mr. Hamdan is raising here, the constitutional matters, are ones that the military commission can't decide because of command influence. They're biased by command influence, and they lack expertise. And that is

why the Supreme Court rushed to hear the case and said it was in the public interest to do so.

So we believe--I'll do the five reasons, Your Honor, like Mr. Marcus--so there are five reasons why we believe that abstention isn't appropriate here.

The first is that abstention here may eliminate the Court's review. Abstention here is a part of a calculated effort to block resolution of this issue. Even if this trial is to happen on December 7th, and there is much reason to think that it will not, despite the fact we're trying to get it to be on December 7th, and even were the Commission to recommend that Mr. Hamdan be found not guilty, this matter would then go to the appointing authority. The appointing authority would then have the ability to send it back to the commission to look at other matters or lesser included offenses.

And it would then go, after that, to the secretary of defense and to the president for his review, and there is no time table on when that would occur. Even if, after all of that, Mr. Hamdan is found innocent of conspiracy, he could then be tried before the commission on another offense, like aiding and abetting, which is a separate offense under the way the Pentagon has defined the elements.

And so even if we take the respondent's best case that Mr. Hamdan may eventually be found innocent after this long process that may take years, you would still be in a vice that would have no end because he could then be brought before the commission for a separate offense of aiding and abetting, and that offense may be one, on the basis of the very same predicate offenses, the five that you mentioned before.

The second reason is that only this Court can provide relief. Unlike other abstention cases, this is a challenge to the fundamental structure of the Commission on its face. Councilman and New said, as a factual predicate for abstention, that Congress has set up a fair system that has balanced rights. And here that very notion is in question. The notion of abstention in the D.C. Circuit is an abstention to a

fully grown system. That's what New says. Indeed, that's what Councilman says. And here, you have not a fully grown system, despite maybe some historical precedents from World War II or from the Civil War, here you have something that doesn't even look like past commissions.

As to that, and to this commission, there is no claim of expertise with respect to the constitutional issues, and indeed there's no claim to the basic fairness of this commission because, unlike Councilman and unlike New, this is not a court-martial in any way shape or form, and the government shouldn't be able to harvest the benefits of a court martial, things like Councilman, when they simultaneously deny that they're bound by court martial rules like speedy trial and the like.

Indeed, here, the proceeding is entirely different from a court martial, in terms of the selection process of the judges, the command influence on the members of the commission, what the appointing authority can do. The appointing authority who approves the charges is the same person who rules on the motion to dismiss and other dispositive motions. Court martials have offenses defined by Congress, in general. They define the rights of the defendants in Congress ahead of time not in this process that's ongoing and evolving and the like.

And here I just want to point out Mr. Marcus, and indeed his brief at pages 8 to 10, talk a lot about all of the rights that Mr. Hamdan has in this proceeding, and they're all rights that he's reading from Military Order No. 1, an order promulgated by the military to govern military commissions. And while Military Order No. 1 does specify certain aspects of the Commission process that Mr. Hamdan may be entitled to, it is important that the Court read the last two paragraphs of the order and not be told that, and to understand that when Mr. Marcus stands up and says there's a right to get exculpatory evidence and a right to confront witnesses or call witnesses that are reasonably available, all of that is coming from

Military Order No. 1. And the last words of Military Order No. 1 are as follows:

"This order is not intended to, and does not, create any right to benefit or privilege, substantive or procedural, enforceable by any party against the United States or any other person."

And then the last line is, "The secretary of defense may amend this order from time to time."

It is very hard to use the court martial cases, which are built on a rock established by Congress, with rules that can't be changed as the system is ongoing, to this process because this process is ongoing, in flux, and on its own terms guarantees no rights to Mr. Councilman. And that's why Mr. Hamdan--guarantees no rights to Mr. Hamdan. And that's why, unlike Mr. Councilman or Mr. New, who weren't challenging the court martial system itself, they were only challenging the edges of the system, here, Mr. Hamdan is challenging the system itself.

The next reason to avoid abstention in this case has to do with the equity of the public interest. This is the first commission in 60 years. In those 60 years, we've had the Geneva Conventions. In those 60 years, we've had changes to domestic law, including the Uniform Code and major changes to the interpretation of our Constitution, and recently there has been an attack on our country, unprecedented in its physical impact and upon the nation's psyche.

A clear, efficient and just resolution of these matters is essential now not just for Mr. Hamdan, but for all of us. There's a need to do it right the first time. And even Younger, the great case on abstention, says, when you have weighty matters of constitutional law, in which the result is fairly clear, abstention is not appropriate.

The need here is nothing less than it was in Quirin, in which the Supreme Court, at Page 19, said the public interest requires prompt resolution of this issue now. The need is no

less than it was in the Supreme Court in the Vallandigham case in the Civil War, when it rushed to hear that case as well. Indeed, it is more, given the earth-shattering changes since the Quirin decision.

Another reason why abstention isn't appropriate here is that the abstention would be because of a post hoc charge. And a post hoc charge shouldn't be used to delay this lawsuit. Had the charge been something that was brought in advance before Mr. Hamdan or Commander Smith filed the petition back in April, I think that would look a lot closer to Councilman, it would look a lot closer to New, because in both of those cases, the gentleman rushed into federal court after they had been charged in a court martial.

Here, the abstention argument is being voiced with post hoc charges brought in July, well after the petition was filed. And what we're seeking, and the principles of equity would counsel hearing this case now not just for Mr. Hamdan, but for everyone. After all, the Supreme Court, in the June Rasul decision, says it is up to the federal courts to decide these matters of the Guantanamo detainees in general.

And were this Court to abstain and even just if you held this in abeyance, the result would be to give the government a weapon that it could use in all of the Guantanamo detainee cases by saying we will bring someone before a military commission or we're investigating, and they may be potentially tried by a military commission, and therefore delay all of the Guantanamo cases that are currently pending before this Court or at least a subset of them.

The last--

THE COURT: Professor, let me stop you there for a minute. Well, go ahead with your last reason, and then I'll ask questions.

MR. KATYAL: The last reason, Your Honor, is that abstention is improper when personal jurisdiction is in doubt, and that was some of the interchange you had with Mr.

Marcus. Never once has a federal court abstained when someone says, in a colorful way, I'm not before the purview of this military tribunal. And the extent, and the reason is that the extension of military jurisdiction to additional person is tremendously disfavored, that military jurisdiction is harsh even at the best of times, in a court martial proceeding or the like. And because of that, federal courts police up front that extension of jurisdiction.

Now, you've heard Mr. Marcus say that in Reid and Toth, the civilian status of the individuals was undisputed. That is absolutely not the case. The solicitor general himself, in the brief before the Supreme Court in Toth, says the following:

"In our view, and in the view taken by Congress and the lower federal courts for over 90 years, the fundamental error in petitioner's approach," Toth's approach, "to this case is imbedded in the first sentence of the argument declaring that Toth at all times pertinent was a civilian."

This is, again, quoting from the solicitor general. "He was not a civilian. He was an airman in the armed forces subject to military law on military assignment outside the United States."

And as for Reid, the solicitor general said something much the same. In both cases, the personal jurisdiction was very much at issue in the federal court proceedings, and our claim is that this case, that Mr. Hamdan is just like, for these purposes, Reid and Toth. They contest the jurisdiction of a tribunal. Indeed, the case here is far stronger because this is not a fully grown court system.

THE COURT: Respond, if you will, to Mr. Marcus's assertion that all of the arguments that you're raising here are also being raised before the military commission.

MR. KATYAL: Right. They are being raised before the military commission. We have filed those motions before the

commission, and the commission itself can't decide these issues as a matter of the way the order is written.

They have to be decided by the appointing authority, who is the prosecutor for these purposes. He is the man who approved the charges, and so the commission, I believe, can make a recommendation, but then it goes to the appointing authority, and we have some sense of the appointing authority's views on things like speedy trial, which is something we tried to raise with the appointing authority because we got that one-line response back, which is in our petition attached as an appendix. I believe it's Appendix E, which says that the Uniform Code of Military Justice speedy trial provision does not apply.

Our point here is that even were these issues to be resolved by the appointing authority, they lack the expertise. It is not a type of fully grown court system to which comity should be deferred, and here it imposes severe harm to Mr. Hamdan and severe harm to the public interest as a whole.

THE COURT: What about Mr. Marcus's I'll call it a concession, maybe it's not that, that everything you're raising now can be raised at the end of these proceedings?

MR. KATYAL: They certainly could--

THE COURT: Of this petition, in this court, before this judge.

MR. KATYAL: They could. And the question is when would that occur? It could be years down the road because of what I've tried to explain, that the military commission, the trial may happen on December 7th, it may not happen on December 7th. As you know, trial dates are always kind of set in advance, and they often move. Here, actually, they're architecting a whole new system with any number of difficult issues--translators, access to evidence. Today, we were prohibited from actually viewing the physical evidence in the case. So we have to actually fight that issue.

There can be any number of things, and while we've been working 100-hour weeks to try and get this trial off the ground, at our request, we wanted it on December 7th, we don't think it's going to happen. And so our position is there is no need to wait; that waiting will only hurt Mr. Hamdan, and there's no guarantee or when, if ever, this military commission process has an end.

THE COURT: The Washington Legal Foundation, in its amicus brief, makes the other side of that point. It says that "Federal court intervention is a surefire way to tie the proceedings in knots."

I mean, if I were to do what you want me to do and declare this unconstitutional, that would stop everything while you all go the Court of Appeals, and then everybody goes from there, I suppose, to the Supreme Court. Meanwhile, your client is sitting down there in Guantanamo Bay, and nothing is happening. Is that in his interest?

MR. KATYAL: We believe it is, Your Honor, because the alternative is to have the trial go forward, and then have the same type of federal court review that you're talking about, again, tying the proceedings in knots just down the road rather than now. Either way, we anticipate additional federal court litigation. However, we believe the balance of equities strongly favors this Court's resolution of the matter now.

Indeed, we take the position that it would be far better to get federal court involvement now so that we can do it right instead of going through a process, and then at the end of that process, the commission process, having federal court review which might strike it down, and then Mr. Hamdan will face either a revitalized and different military commission process, depending on which of the merits arguments were accepted by the courts or he may face a court martial process or he may face perhaps an Article 3 tribunal or our Article 3 federal court criminal prosecution.

So we believe that, in terms of Mr. Hamdan, there isn't much of an end in site either way, but we believe because of that the federal court should start its review now. We've been trying, and we've been patient with the government as they request abeyance in May, for the Supreme Court decisions to come down. We've been patient when they say, "Let's change venue." We have not tried to really force--we haven't walked in with a temporary restraining order or anything like that because we've tried to be respectful and avoid the theater that you're suggesting.

But this is a case in which it's brought not just on behalf of Mr. Hamdan, it's being brought on behalf of everyone facing military commissions, and there is a strong public interest in getting it right the first time before these commissions get off the ground because, otherwise, we'll have to redo some of them, and the rules won't be clearly laid out.

And so for that reason, courts have traditionally policed these matters ahead of time rather than later. And Quirin, I think, Your Honor, is the best example of that because the Washington Legal Foundation's argument could have very well been made in that very case. Let's just wait until after. And there wasn't a public interest in doing that. Indeed, there was a strong interest in moving forward now.

If I may, I'd turn to the separation of powers matters.

The government here is creating the first commission in 60 years in a constitutionally dubious way. Instead of going to Congress, which could have set these up with a national perspective in mind, they rushed these through on an emergency basis, and the results have been catastrophic. The government's best argument is that Section 821 of the U.S. Code approves military commissions. The problem with that is that that text doesn't say that. It doesn't provide any affirmative support for commissions. It merely says that the Articles of War or the Uniform Code "do not derive

commissions of jurisdiction," but they don't define what that jurisdiction is.

And, certainly, Section 821 doesn't meet the general rule that to deprive someone of rights, Congress has to speak clearly. That's Gregory v. Ashcroft, Kent v. Dulles and the like. And so the government has a fall-back position, and the fall-back is, even if the statute isn't clear, the Quirin case authorized the commission, but then they have to be bound by the facts of Quirin, and the Court there approved of a commission in a very different circumstance and not here. And we can divide the differences up into time, place and manner, and I'll start with place.

The place was on a battlefield. The first thing Attorney General Biddle did on the first day of his opening argument as the prosecutor was to stand up and introduce Public Proclamation No. 1, which was, pursuant to the congressional declaration of war, and placed 15 states in the Eastern Seaboard under the Eastern Defense command and said that military trials of enemies could happen there.

Guantanamo is not even conceivably a theater of war. The Supreme Court actually said, I believe, that it was a place removed from hostilities. And the Quirin case relied heavily on Winthrop's treatise, the 1920 treatise, on military law. And Winthrop's treatise, as the international law brief, the amicus brief, as well as our own brief point out, say that military commissions are only permissible in theaters of war, and military commissions have only generally occurred in those theaters of war. There's been one exception to that, and that one was authorized by a congressional statute.

Without that basic geographical limitation, military commissions look a lot more like creatures not of necessity, but creatures of convenience, and the general rule is that military commission are tremendously disfavored bodies, that, if you can use a court martial, you use it. You only use a military commission where it's necessary.

Mr. Marcus says that the commissions here are narrower than those in Quirin because they're only trying violations of the laws of war. That is not the case factually in that president's order, as well as the military instructions, say that the commissions are to try violations of the laws of war, as well as other offenses triable by military commissions, and it's just inaccurate. President Roosevelt's order applied to eight individuals by name. This applies to four billion individuals, everyone who is not a U.S. citizen.

Your Honor, before you were asking about Article 1, Section 8, you were asking Mr. Marcus and about a case. I believe the case you were referring to is Reid v. Covert, and Reid v. Covert says that our Congress has the Article 1, Section 8, power to define offenses that are violations of the law of nations, and that's what that case was saying, and that's part of the general trend that military tribunals of any sort, even court martials, are disfavored institutions, and that federal courts have to police the boundary very carefully.

The other thing about place that has to do with who is doing these commissions in today's circumstances. It is not the military. They brought civilians into the process, unlike past military commissions, like those in Quirin, which are purely run as a military operation. Congress has said, in 10 USC 750, that command prerogatives exist only to people on active duty.

And, again, this seems technical. I understand why geography, why who was doing it, why do these matter? The reason is that military commissions are only creatures of necessity, and indeed, you may have heard the general rule, that if you want something done fast, you don't give it to a civilian. And here what is going on is these commissions are being given to civilians, and the process is being slowed down. And it starts to look like necessity doesn't really justify these things. And that's what justified the commissions in past conflicts.

With respect to manner, this is an emergency--Quirin was an emergency situation of people who landed, where prompt action needed to be taken, and with offenses that were defined by Congress, for the saboteurs in Quirin were charged with violations of Article 81 and 82, which were statutes passed by Congress that explicitly allowed trial by military commission. Here, there's nothing even close to that. There's no statute that says conspiracy is triable by a commission. Indeed, if anything, the federal statutes and the War Crimes Acts of 1996 and 1997 sure seem to indicate that Congress believed that conspiracy wasn't an offense triable by the laws of war. They reference literally dozens of different crimes, and that wasn't one of them.

With respect to time, Quirin took place in a time of declared war, when the entire resources were pledged to defeating the enemy, at a time when the Alien Enemy Act kicked in to deprive alien enemies of rights. The Supreme Court emphasized repeatedly that war had been declared there.

Here, all we have is an authorization for the us of military force. It is limited on its own terms, Your Honor, to "force," and not even all force. It is limited to the force to deter and prevent future acts of terror. That gives the president license to hunt and kill terrorists. We don't dispute that. It even gives them the license to detain enemy combatants. That's what Hamdi is about. But it does not, on its own terms, give the president the ability to look back in time and assess the guilt and innocence of people because that, after all, is not part of force.

And this tracks the general view that declarations of war give presidents additional powers. And this isn't some, you know, highfalutin, liberal constitutional law theory. As the 16 law professors' brief points out, quoting Ted Olson, Chief Justice Rehnquist and others, the president's powers, the president's war powers, are at its apogee when there's a declared war. That's what had happened in Quirin. That's

what it was in Yamashita. Indeed, even Eisentrager is relying on that declaration of war.

Here, you've got something very different.

THE COURT: At the beginning of this discussion of time, place, and charges, you slid the whole discussion over into Quirin and said that's all they had to fall back on, but that's not my understanding of the government's argument at all. Quirin is sort of belt-and-suspenders, as far as the government is concerned. Their claim is that there is an inherent authority that is saved, preserved intact by Article 21.

MR. KATYAL: Your Honor, no Court has upheld the idea that the president has the inherent authority to create military commissions. Quirin explicitly reserved the issue. The text of the Constitution would belie such an interpretation because it gives the president not only--it gives the Congress not only the power the declare war, but also the power, in Article 1, Section 8, to define--

THE COURT: Whatever the source of it--

MR. KATYAL: Yes.

THE COURT: --whether it's Article 1, Section 8, or whatever, Yamashita says that Article 15, which is now Article 21, was added to the Articles of War to avoid the conclusion that the authority to try persons before a courts martial might be construed to deprive the nonstatutory military commission of a portion of what was considered to be its traditional jurisdiction and to preserve that jurisdiction intact.

MR. KATYAL: Yes.

THE COURT: Now, what was that jurisdiction that is being preserved intact?

MR. KATYAL: Two different responses, Your Honor. The jurisdiction is when Congress has said certain things are triable by military commission like spying, like aiding the enemy. The extension, in 1916, that grants courts martial the

ability to try that doesn't exclude the ability of military commissions to try those very offenses. It doesn't go further than that. And, indeed, if it did, our position would be it would only go further than that when war has been declared, when the president's powers area at its apogee to create these military commissions.

It certainly wouldn't extend to a commission like this, which isn't even at a theater of war and not even staffed by purely military authorities. This is a commission that looks tremendously different from those. And for the government to stand on the rock of those precedents is I think extremely dubious. Let me just give you one example. Their brief points out that their brief relies heavily on the 1818 commission by General Jackson. The source they used for that, Winthrop, says General Jackson should have been indicted for murder for what he did in convening that commission and staffing it and making the decisions that he made.

So the idea that this is some kind of inherent presidential power, above and beyond congressionally declared wars, I think is an extremely dubious proposition.

Do you have any other questions on separation of powers or may I turn to equal protection?

THE COURT: You can turn to equal protection. I think you can tread pretty lightly on equal protection. I want to hear about Geneva Conventions from--

MR. KATYAL: I'll just say two things on equal protection.

Number one, our view is that Footnote 15, in Rasul really does change the legal landscape and extend notions of equality to at least Guantanamo, whether it's considered U.S. territory or not.

And, second, this is the very first time a military commission has been done to discriminate against aliens; that is, the 1847 precedent they talked about, Quirin, these are all military commissions that applied symmetrically between

aliens and citizens, and this is a commission with offenses against the laws--that's trying offenses against the laws of war. Those offenses can be committed equally by citizens and aliens, and there is no rational basis for discriminating among the two. It's not like immigration because an immigration violation can only be committed by a foreigner, by an alien. These are things that can be committed equally by citizens and aliens, and therefore it should be entitled to at least rational basis review.

Thank you, Your Honor.

THE COURT: Thank you.

MR. McMILLAN: Good afternoon, Your Honor. My name is Joe McMillan. And if it's all right, I would just address very briefly the questions of self-execution of the Geneva Convention and reserve for Lieutenant Commander Swift other issues relating to the convention and military commissions.

THE COURT: All right.

MR. McMILLAN: I'd like to make a few points with respect to why that issue is irrelevant first, and then, secondly, I'd like to make a few points with respect to why, even if it is relevant, the Geneva Conventions are self-executing.

First, it is irrelevant because under AR190-8, Army regulations, the Geneva Conventions have already been implemented and are part of the domestic law of the United States.

In fact, these regulations are explicit in stating, and we quote this in Footnote 33 of our reply brief, that this regulation implements international law, both customary and codified, and includes the 1949 Geneva Convention relative to the treatment of prisoners of war.

In his concurring opinion in the Hamdi Supreme Court case, Justice Souter correctly noted that this regulation "as adopted to implement the Geneva Conventions." So the

whole question of self-execution is really irrelevant. They have the force of domestic law.

The second point is a point that Your Honor has already touched on, which is that, under UCMJ Section 821, which saves jurisdiction for military commissions, the language of that statute incorporates the law of war by stating that the commission will have the authority to try offenders and offenses that, by statute or by the law of war, may be tried by military commissions.

And as Your Honor already noted, the Geneva Conventions are, at this time, the most complete codification and current statement of the laws of war. Consequently, 821 can be seen as implementing or executing the Geneva Conventions for purposes of military commissions, requiring that any commissions that be conducted be conducted in a manner consistent with those universally recognized statements of the laws of war.

That's why the whole question of self-execution is irrelevant. But even without those, even if we look at the issue of are they self-executing, it's clear that the Geneva Conventions should be considered self-executing. The Supreme Court of the United States has made it clear, and indeed even Judge Bork has said that if the language of a treaty speaks in terms of individual rights, it may be regarded as self-executing.

The head money cases, going back to 1884, speak in terms of treaties capable of enforcement as between private parties in the courts of a country if they provide a rule by which the rights of private citizens or subjects may be determined. And the Geneva Convention, in article, after article, after article, provides precisely those sorts of rules of decision, rules by which the rights of individuals may be prescribed.

And, in fact, we bring before the Court 103 of the Geneva Convention, which provides exactly such a rule, a rule that any pretrial confinement, under no circumstances,

should exceed 90 days. But we could go on and on, in fact, as some of the amici have.

Article 102 provides that any trial of a POW must be conducted in the same military courts that would hear the trial of a member of the detaining powers' military.

Article 105 provides that individual rights, such as access to prisoner comrades and access to witnesses for defense.

Article 106 provides the right of appeal in the same manner as a service member of the detaining power.

So right down the line there are numerous instances identifying individual rights in the provisions of the Geneva Convention. Based on the authority of the head money cases, those are precisely the kinds of treaties which the United States courts have long recognized are enforceable in courts and have the effect of domestic law.

The fourth point I wanted to make was with respect to the legislative history. There is clear legislative history indicating that these Geneva Conventions are self-executing in some of their provisions, and in others perhaps were not. In fact, we cite in our brief the ratifying report of the United States Senate in 1955, and that ratifying report quoted in our brief makes it clear that the United States Senate Committee on Foreign Relations believed that pretty much all of these provisions were self-executing. And I quote: "It appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four Conventions." They identified only four articles that still required implementing legislation. None of them have anything to do with the claims in this case.

Likewise, the commentaries of the Geneva Convention emphasize the differences between the 1929 version of Geneva and the 1949, and all the flaws of 1929 that led to the abuses or contributed to the abuses in World War II, those flaws consisting of reliance on diplomatic protests and

reciprocity. Instead the Convention, in its own--the very first article includes language that the high contracting parties undertake to respect and ensure respect for the present Convention in all its circumstances.

The final point on self-execution--and then I'll sit down and let you hear from Lieutenant Commander Swift--is that by coming before the Court and asking this Court for a ruling that the Geneva Conventions are not self-executing or have not been implemented already in the domestic law of the United States, and therefore provide no basis for us to come before this Court. By doing that, ironically, the government is asking this Court to issue a ruling which would state to the world that the United States is in default under its international obligations on a treaty, a series of treaties some 50 years old, which we have on numerous occasions appealed to and held up to the world and held up to our enemies as the clear statement of the laws of war.

THE COURT: Mr. McMillan, let me try something out on you that I approached the subject with Mr. Marcus--I didn't quite get there and I expect we'll get there when he stands up again--on the distinction, if there is a distinction between what is self-executing and not and what gives rise to a private cause of action and not. This is kind of a soft pitch for you I think, but let me try this out on you.

This is a petition for habeas corpus. The habeas petition puts it to the respondent to show cause why the respondent is complying with the law. So to demand, as the habeas petition does, to demand that a respondent show why the treaties and laws of the United States do not apply, is really not asserting a new cause of action by the plaintiff, it's asking the respondent to explain why they are complying with the law. Does that make any sense?

MR. McMILLAN: That makes perfect sense, Your Honor, and I agree with that. In fact, we believe that by virtue of the habeas element in our petition, the burden is on the

government, on the respondent, to show that their conduct vis-a-vis Mr. Hamdan is lawful.

THE COURT: I mean the classic no cause of action case is Diggs, for example, where there was a National Secretary Council resolution about Namibia, and the plaintiffs wanted to stop Americans from importing Namibian seal fur. Well, that's a private cause of action brought about--had no--the plaintiffs weren't invoking any of their own rights. They were invoking a different set of rights.

MR. McMILLAN: Exactly correct, and grossly different, vastly different from--

THE COURT: All right. Well, that was a soft pitch to you. Go on to what you were going to say. I'm sure I'll hear it from Mr. Marcus.

MR. McMILLAN: That concludes my remarks ont self-execution issue.

THE COURT: All right. Thank you, sir.

Mr. Swift.

MR. SWIFT: Good afternoon, Your Honor. I've had the period of time to talk about the Geneva Conventions, and if history tells us anything about military commissions, we know that for them to be viewed as legitimate, then the rights of the accused must be what they champion. Every military commission that hasn't championed the rights of the accused is not favored in history's eyes.

The Community of Nations knew that in 1949 and so did Congress when they passed the Uniform Code of Military Justice, and the Community of Nations, having experienced the most horrific war in human history and having gone through a series of commissions, sat down to write the Geneva Conventions. They passed it certainly with the practices and criticisms of the World War II commissions well in their mind. Both the Uniform Code of Military Justice was passed under that circumstances and so were the 1949

Conventions. They had the recent past and the mistakes of it to look at.

The civilian architects of Mr. Hamdan's commission have ignored history, and they've selectively read the Uniform Code of Military Justice and the Geneva Convention with an eye to escaping their mandates rather than following them. There is much jeopardy in doing so. I think it's illustrated--you started to ask questions about Common Article 3. It's illustrated in the commentator's purposes behind Common Article 3 and what had previously occurred. During World War II the German Army gave absolute POW protection to U.S. troops and to British troops and to French troops, but they didn't give it to Russian troops. You see, the Russians hadn't actually gotten around to signing the 29 Convention. They were involved in a civil war at the time. So the German argument was, "Well, the Russians aren't POWs. That means they're not people. That means I can move you into a concentration camp. That means I can gas you. That means I can work you to death in slave labor and summarily execute you, and I haven't committed a violation against the laws of war because you aren't a POW." They actually argued this at Nuremberg and other tribunals.

So when the drafters got together they knew that there couldn't be a hole through which someone could fall. Common Article 3 was the most debated because there were certainly a lot of competing interests. The problem was it might apply to a civil war or to rebels, and governments were legitimately worried that someone like Timothy McVeigh could suddenly say, "Well, I'm at war with the United States and I should get POW status," after he blew up a building. They didn't want that. But they realized that also much damage was done outside of the regular armies, so they set out to drafting Common Article 3.

Now the government gets it completely wrong when they talk about non-international armed conflict, because those are terms of art. Inside the Convention international armed

conflict really means between two high contracting parties. If you're not a high contracting party, then you're not in it. So international armed conflict, which is defined within the Conventions, is between two high contracting parties. Where does Common Article 3 come in? Precisely the Russian situation. Not a high contracting party. So we will now all of us agree that within our territories or any territory of a high contracting party, that when we come into noncontracting parties, see, the government has argued here the Taliban. There's great debate on that, but I don't think we need to reach it for Common Article 3 purposes, because certainly they would fall within that, or al Qaeda. These are persons who are noncontracting parties, or at least as far as al Qaeda goes, who would fall within it, the idea here where it comes to that part of Court giving all of the protections necessary, all of the judicial guarantees recognized as indispensable by civilized persons. Commentary makes this very clear what they were seeking.

You could treat them as a prisoner, and certainly there were lots of statutes, and you were encouraged to do so, which would permit under the Third Geneva Convention trying them as POWs. Use a court martial system. All of that was available. If you chose not to do that, then you would treat them as a common criminal. All nations agreed that they weren't going to treat people worse than they treated the accused rapists and murderers and all of the other persons within their society who were common criminals. They weren't going to create this class of non-humans that had been the Russians during the war.

So they set out this and they said civilized guarantees. Now, the government stood up and somehow this military commission comports with civilized guarantees. Nothing could be farther from the truth. First off, there is no independent judiciary. This is an adversary process without an independent judiciary. No judge sits here to make rulings. All of the commission makes it together. But on the

commission is someone with a military background--excuse me, a legal background. I'm not sure that that's good at all for Mr. Hamdan, however, because it has the effect of making that individual a super juror, the presiding officer. However, they can't rule on anything that would be case dispositive. That has to be sent up to the appointing authority.

You mentioned earlier, haven't we brought all those motions? Sure we have. The problem is the only person who can win before the military commission is the government. If the commission rules for the government that we lose, then we keep going. If we win, we go to the appointing authority. Now, the appointing authority is the person who already determined that this commission was legally in position and set the charges there. The Supreme Court's looked at that type of process when looking at a judge who served as a grand jury and then becomes the trial judge, and they said, "Wait a second. That's not due process." So clearly we have no independent judge.

The next one is he has no right actually to be present during the hearing against him. The hearing can be--and it had already been conducted, portions of it for Mr. Hamdan, outside his presence. He can be excluded, not for his conduct, because the government doesn't want him to know what's in it. They make a great big deal out of I can be there, but anybody who's practiced trial law, especially criminal law, knows that where you get your cross-examination questions from is turning to your client and saying, "Did that really happen? Is that what happened?" I'm not permitted to do that. So he has charges as in a Star Chamber by somebody, wherein through substantial portions of the hearing he's excluded from.

He has no right to self-representation. In our particular case we've been able to form and I'm representing him. Not all detainees desire such, and again, looking at the process as a whole, self-representation again has always been a

hallmark, both under the Geneva Conventions and under our own law. He has no right to that.

He has no right to appeal to an independent court, none, again, in violation of the Third Geneva Conventions which apply in this case as well, which I'll get into, but he has no right to appeal to an independent court. I, as a military member, have that right. I have the Navy Court of Criminal Appeals followed by the Military Court of Criminal Appeals, which is independent civilians, and following the Supreme Court. Mr. Hamdan is reduced to habeas, and we both know that that's not the same thing.

Finally, he has no right to confront the evidence against him. Evidence can be brought in in any statement, form or shape, merely if it's probative. There is no need to produce the witnesses who said he said something. There is no need to produce the witnesses that the government's calling. It can be a completely paper case. They can obtain these statements in the dubious methods of Guantanamo and then not bring the witness forward. Recently in Crawford the Supreme Court talked about whether that was due process. So he doesn't have the rights that a regularly independent court, under the Common Article 3 system.

And what they had in mind here was make a choice. Choose them as a criminal and say that they have no combatant immunity, and we can prosecute you now as a criminal, or choose that you're a POW. If you're a POW, of course, you can still be prosecuted for war crimes under that manner. Either would work, either system, but the government has chosen neither.

You've asked much on abstention and I'd like to move to Article 10 and 103 if I might, Your Honor, unless you have some questions for me here.

THE COURT: In the list of things you just recited to me, you did not mention the exclusion of coerced or unreliable confessions.

MR. SWIFT: There is no guarantee of such. It's a question--I don't presume to guarantee it because the standard is probative. I would hope that they're not probative. But because I don't have the right to bring the person forward to elicit it, it may be a moot point. My more important idea is that without the right to confrontation. I'm not trying to overstate my case here. They might choose those are not probative, but there certainly is that possibility.

THE COURT: All right.

MR. SWIFT: Article 10 and 103 in the speedy trial issue, and we've set it out in our brief, but it's best understood at where you sit, as I sit and Mr. Hamdan sits on January 30th. He's been moved into solitary confinement solely for the purpose--he hadn't done anything while he was down there. He got there because we want to try him by military commission. There's no charge. We'd like him to come up with what he'd like to plead guilty to as evidence to you. And we say, "Well, you know, we'd like to be charged or let out of solitary confinement." And the answer is, "Article 10 doesn't apply. We can hold you in this position literally forever."

Article 10 and 103. Being in the military and/or being detained have some restrictions on freedom, detention certainly more than the military. There are some restrictions on this, but that is far from the pretrial segregation that he was placed in that started the clock.

Again, on 103, the drafters of the Geneva Convention understood that. They said it was to be highly disfavored. Why? Because when you have people detained either as civilians in civilian detention or military persons in the POW detention, most of the reasons you put somebody into a jail cell beforehand don't exist. You know, you're not worried that they're going to fly the coop. What you're worried about and the standpoint in this one is you may want to separate them while you conduct an investigation or something. There

might be a reason for it. But they recognized that that could be badly abused, and it was abused here.

Where the government argues under Article 10, you know, that same argument--let's flip for a second to go to Article 55, because I wonder if they'd make the same argument that there be no speedy trial rights.

THE COURT: Hold it, Commander, because part of my mind is now engaged with what the plurality of the Court said in Hamdi.

MR. SWIFT: Yes, sir.

THE COURT: Detention may last no longer than active hostilities.

MR. SWIFT: That's correct, sir.

THE COURT: But if the record establishes that United States troops are still involved in active combat in Afghanistan, detentions are a part of the exercise of necessary and appropriate force. Now, that was only four Justices, but that's the guys that are above my pay grade.

MR. SWIFT: Absolutely, sir, and I'm not contesting it. In fact, I think it weighs heavily on the issue here. Mr. Hamdan was--we would not have brought this claim had Mr. Hamdan stayed sitting in Camp Delta in detention. He was sitting there like all of the other detainees. But on December 15th he stopped being like the other detainees.

THE COURT: Okay. So and Mr. Marcus are in sync. The clock started running when they charged him.

MR. SWIFT: Absolutely, Your Honor.

THE COURT: When they charged him or when they moved--

MR. SWIFT: When they moved him into--for Article 10 purposes, when they moved him into the--into Camp Echo into solitary confinement.

THE COURT: That was December 15th?

MR. SWIFT: Yes, sir.

THE COURT: When did they charge him?

MR. SWIFT: They didn't charge him until July 13th, 2004.

THE COURT: Okay.

MR. SWIFT: We've argued on--speedy trial is actually one of those things the military have done, and they get it wrong. It's not a day-for-day test under Article 10. The cases are all over the place. You can find a case for 25 days. It's due diligence, and there is nothing here to indicate that the government exercised any diligence at all. Here his previous period of time in incarceration weighs against it because they've had lots of time to interrogate him. They had lots of time to determine what evidence they had. In fact, they've gone to the President six months before and said, "We're ready to go on this guy. We have enough evidence. You should find an RTB. Wait six more months before"--

THE COURT: What's RTB?

MR. SWIFT: Reason to believe, sir.

THE COURT: Oh, thank you.

MR. SWIFT: The President's finding that you referred to earlier, they obtained the reason to believe in July, on July 3rd of 2003, so there's no showing that there was any exercise of due diligence. Now, I'm well aware of the McDonald case, sir, and other military cases that says speedy trial is something you normally abstain to, and you go through the trial process. And we would agree with that except there is no process. We shouldn't be required to go through futility while he sits being held for the trial longer because, again--and this is why it's particularly relevant to you--is the appointing authority who rules on all dispositive motions, speedy trial being one of those things, has already said he doesn't have an Article 10 right. So I can go down there and argue it, but we all know I'm not winning it, and I shouldn't be held to futility to say, well, in maybe a year or two you can come back and argue your speedy trial motion

again. The courts were set up with the idea that there was an independent judge there and it was not futility to argue it.

THE COURT: If hypothetically the Geneva Conventions applied here, what would your position be on speedy trial?

MR. SWIFT: At 90 days we violated the Geneva Conventions. The Geneva Conventions set out a hard rule on this standpoint, and I think the 90-day--at that point, 103 moved beyond any speedy trial and the mandate of the Convention. And likewise, interpreting what does that mean--because it does not say what happens next; it says "shall"--but our courts have always looked at a shall prerogative, when that's failed, that the proper prescription is to bar the trial. It's not to bring charges against General Hemingway or Mr. Altenberg or to bring charges against the Secretary of Defense failing to do it, or even the prosecutors. It's to bar the trial. That's the most effective remedy.

Now, as I was pointing out, why the Geneva Conventions gave such a hard date was again because they're into detention. You see, if you move somebody into something to hold them solely for trial, you change the character of their detention, there's very little reason for why you would need to do that, and certainly you should do it in extremely limited cases, and you should be ready to go to trial quickly because it's not the situation we face often in criminal trials, where we capture someone, and the government has enough evidence to obtain a warrant, but there's much investigation to be done.

THE COURT: What does the record contain? I'm talking about the record now. What does the record contain, if anything, about the reasons given by the government for transferring Hamdan to Camp Echo on December 15th?

MR. SWIFT: They give two reasons, Your Honor. They give two reasons for that transfer. One was convenience to me. It was to make my life easier. Now, certainly we protested immediately and said we didn't need my life to be easier. It was hard enough getting to Guantanamo Bay, I

didn't need--you know, the ICRC and other organizations interview detainees all the time in Camp Delta, and the two camps are basically adjoining, so it was not necessary for me to go someplace else for it.

The second reason they gave was to prevent Mr. Hamdan from having contact. Basically, as they admitted in oral argument at the first hearing before Judge Lasnik, they were concerned that other detainees might find out, well, sir, that I existed, that is, that there were lawyers out there, and you might someday get one and that would interfere with intelligence gathering. And to that extent, they believed that it was necessary to move out, so they moved him out in pretrial confinement so that I could meet with him.

Now, whether that was legit or not, it started the clock, but it didn't in any way--nothing in the record establishes that while they were holding him there, that they were exercising due diligence in getting him to trial. If they weren't ready to go to trial there was no requirement to move him out, none.

THE COURT: Okay.

MR. SWIFT: Lastly, Your Honor, I will reserve the balance of my time for Mr. Katyal for rebuttal if any. It's kind of--if we are allowed to have a rebuttal.

THE COURT: Well, you're allowed to have an hour and 15 minutes.

MR. SWIFT: Have I used it?

THE COURT: I don't care what you call it. You have not used it. You have--

MR. SWIFT: I'll reserve the balance of my time. Thank you, sir.

THE COURT: You have something like 15 minutes left.

Mr. Marcus? There's no requirement that you use all this time.

[Laughter.]

MR. MARCUS: Thank you, Your Honor. First, on abstention, petitioner's emphasize that this--the military

commission is not a court martial, but the fact remains that the military commissions have been recognized since the beginning of our history, and the Supreme Court, in four decisions about 60 years ago, upheld their authority and their jurisdiction to try violations of the laws of war. Given that history, it seems fair to conclude that it is a process that's owed deference, and--

THE COURT: Is this the first one in 60 years?

MR. MARCUS: Roughly, I believe so.

THE COURT: So there were none in Korea, none in Vietnam?

MR. MARCUS: Not that I'm aware of. I don't believe they were used during those conflicts. Of course, this conflict was begun with an attack on our nation on September 11th of a magnitude--

THE COURT: Of course, that's a given. But were there any courts martial in either Korea or Vietnam of prisoners of war or enemy combatants?

MR. MARCUS: I don't have the answer for you now.

THE COURT: That is possible, is it not?

MR. MARCUS: It's possible.

THE COURT: That's what the concurrent jurisdiction is all about, right, the Article 21 concurrent jurisdiction?

MR. MARCUS: Right, because--

THE COURT: The uniform code now does make it clearly possible to try enemy combatants, prisoners of war by courts martial.

MR. MARCUS: That's correct, and that's--I mean in the Madson case, that was a case where it's not an enemy combatant case, but that's a case where the court did say that it could have been tried by military--I'm sorry--by court martial, but it was tried by military commission in Germany.

THE COURT: And that's since the adoption of the Uniform Code of Military Justice in 1951, which was less than 60 years ago.

MR. MARCUS: Right.

THE COURT: So I would be correct in assuming that maybe the existence of the uniform code and its ability to try enemy combatants and prisoners of war by courts martial may have had some effect on the absence of any military tribunals for the last 60 years, question mark?

MR. MARCUS: Question mark. I don't know if you can draw an inference one way or the other.

THE COURT: All right.

MR. MARCUS: But going back to the abstention point, the petitioner relies on the Quirin precedent, but that case, first of all, that's the only case they can point to where the Court considered the claims before the proceedings were completed. All the other cases during that time period involved challenges after the fact. The Quirin case was a special case. At the time the most, I guess, relevant precedent on the books was the Milligan case. It was the time before the constitutionality of the military commissions had been well established. The Military Abstention Doctrine had not been well developed at that point, and of course the Counselman case is from 1975, I believe, and there in that case there was a presumed American citizen in the case, and their execution was considered, or could have been considered to be imminent, and in fact they were executed approximately a week after, I believe, a week after the court issued its ruling.

So the fact is that the landscape had changed since Quirin, but it was changed not in the direction that petitioner suggests we counsel against abstention, but in fact counsels in favor of abstention, given all the rulings since Quirin affirming the jurisdiction of military commissions to try violations of the laws of war.

I didn't mean to suggest, I didn't mean to suggest that the jurisdiction of this military commission is narrower than the one in Quirin. I meant to suggest that it's narrower than the kinds of military commissions that are put together in occupied territories or theaters of war in order to administer the law generally against a civilian population. My understanding is while the military commission does permit charges that--not strictly defined as violations of the laws of war, that those charges are consistent with the protections that the laws of war established.

Petitioner makes a lot of claims about the process that he's going to receive, how unfair that process is going to be. I think that is actually--I mean we think the process is quite fair, but of course these claims about what might happen before the commission, a lot of it is speculative, and this Court will be in a much better position to assess the fairness type challenges they're making after the military commission proceedings are completed.

THE COURT: Well, what about Commander Swift's assertion that there's no right to confront evidence against him in this proceeding?

MR. MARCUS: I'm not sure about that. I think there is a right to cross-examine adverse witnesses.

THE COURT: You can't cross-examine a document that is hearsay, that the tribunal finds to be probative.

MR. MARCUS: Well, again, Your Honor, I'm not as familiar as they are with all the evidentiary rules that will apply. I mean I think it's understandable that the rules are going to be more flexible than they would be in other types of proceedings, and the President made a determination that following the Federal Rules of Evidence would not be practicable in light of the fact that these prosecutions are going on during a time of war when evidence is collected on the battlefield. We're dealing with an enemy that is highly fanatical and secretive and it might be difficult to get live testimony.

So I think there are a lot of reasons why flexibility is justified here, and again, to the extent they're claiming that it's unfair, that that's something that really--I mean it's speculative at this point. You're not going to be able to tell until the trial's completed.

THE COURT: Article 36 says that the President can fashion--I'm paraphrasing and probably not even correctly paraphrasing--but roughly says the President can apply procedural rules to the extent he finds it impracticable to give the full panoply of rules that would apply in District Court to the extent. And the President in this case simply said it's not possible to no extent, period. He basically wiped the slate clean with that ruling, did he not?

MR. MARCUS: With respect to applying the Federal Rules of Evidence?

THE COURT: Yes.

MR. MARCUS: Yes. He made a--

THE COURT: Wiped the slate clean and--

MR. MARCUS: --determination that it's not practicable to use those.

THE COURT: --start all over again.

MR. MARCUS: Yes.

THE COURT: So we don't know to what extent he found it impracticable. I would find it much more understandable if there had been some careful analysis of what kind of evidence you could expect to put on when some of the witnesses are either dead, or are in Afghanistan, or their testimony would be so sensitive that it would seriously disclose sources and methods and so forth. If there had been some kind of analysis like that, I'd understand it, but just to say, sorry, it's not practicable, full stop, we'll start all over again, is pretty dramatic, wouldn't you agree?

MR. MARCUS: Well, I think you can--I mean I think it's fair to assume that a lot of those considerations were

behind that decision. I'm not sure the President's required to spell out his order in great detail, the rationale. There is--

THE COURT: No, I'm not--he's certainly not required, but the bottom line is we don't know to what extent, we don't know to what extent within the terms of Article 36 he found these rules to be impracticable, question mark?

MR. MARCUS: Right. And what we do know is he did make the determination that in light of the enemy that we'd be prosecuting, that they would be impracticable. And I also mention that it is my understanding that the standard of probative value to a reasonable person, that is a standard that is applied in international tribunals as well.

Moving on to the Geneva Conventions, this Court raised the issue of--well, of 2241, the habeas statute, and I'd like to--the first point is 2241 is not implementing legislation for treaties, and all the Courts of Appeals that have addressed that issue have concluded that it does not in fact constitute implementing legislation, that 2241 does not make non-self-executing treaties self-executing. I can give you some citations I have. I can pass the cases out at the end of the argument if you'd like. The citation--

THE COURT: I'm not talking about self-executing. I'm talking about what the duty is of the respondent to a habeas petition. The duty of the respondent to the habeas petition is to say, "I am holding this person lawfully, and here's the law." Isn't that it?

MR. MARCUS: Well, I don't think it's--I mean the purpose of a habeas proceeding that the habeas petitioner is seeking to enforce, is seeking to enforce a treaty or a law of the United States or the Constitution against the conduct of the Executive Branch. I don't think--I mean if you look at statutes like 28 USC 1331, the Federal Question Statute, and the Alien Tort Statute, 28 USC 1350, they both also mention treaties as a basis for jurisdiction. But again, the fact that it's a jurisdictional basis for bringing a claim doesn't resolve the

issue of whether the treaty is in fact enforceable against the Executive Branch--

THE COURT: So your argument, which you're too polite to put quite this way, is, Judge, you can't bootstrap the Geneva Conventions into an enforceable right of action by shifting the burden to the government through a habeas petition.

MR. MARCUS: And I think you'll find that that's what the Court of Appeals, who have ruled on the issue, have said.

THE COURT: All right. I'll be happy to see any citations you have on that point.

MR. MARCUS: I can state them onto the record.

THE COURT: Say them onto the record.

MR. MARCUS: 325 F.3d 722, a Sixth Circuit decision; 320 F.3d 130, a Second Circuit decision; 305 F.3d 343, was a Fifth Circuit decision; 286 F.3d 1059 is an Eighth Circuit decision. I can pass those around to the Court and to the--

THE COURT: That's fine. We'll get them.

MR. MARCUS: Now, going back to the Geneva Conventions themselves and the language in the Geneva Conventions, first of all, the government is not, by suggesting that the Geneva Conventions don't apply here and that they're not self-executing, we are not suggesting by any means that we're in default of the Geneva Conventions and believe that we're fully complying with them with respect to this case.

And again, if you look at the language of the Geneva Conventions, the question is not whether there's a mention of rights, per se. The question is how are those rights enforceable? And the Geneva Convention speaks to that. Article 132 talks about how an alleged violation is supposed to be dealt with, and it talks about an investigation conducted by the parties, and to be resolved in a way that is agreeable to the parties, and if they can't agree on it on their own, they call in a neutral umpire. I mean there's an enforcement

mechanism in place that makes it pretty clear that it wasn't anticipated that enemy detainees would be able to come into enemy courts and enforce the claims against the enemy government. It's just not in there regardless of whether the treaty actually mentions the word "right" or mentions person or prisoner. I don't think that's the relevant standard, Your Honor.

And to clarify, I think before we talked about the Geneva Conventions' applicability to the Taliban, and I just want to make clear that I believe the President made a finding the Geneva Conventions are applicable to the Taliban, but that Taliban soldiers are not entitled to the protections as prisoners of war because they don't comply with the laws of war.

THE COURT: That's a really hard rail for you to ride, isn't it? We're complying fully with the Geneva Conventions, but you can't test it. That's essentially what you're saying.

MR. MARCUS: Well, it's--I mean it's--

THE COURT: We say we are complying with the Geneva Conventions, but no Federal Court can test that proposition.

MR. MARCUS: Well, there are--we're relying on legal principles. We're relying on legal principles regarding the self-execution of a treaty. We're relying on legal principles that go to the deference that's supposed to be given to a determination by the Executive Branch regarding the enforceability of a treaty.

THE COURT: I don't deny that you're relying on enforceable principles. I'm just saying that's a difficult position to articulate, and you're doing it very well, Mr. Marcus.

MR. MARCUS: But we have also explained, in our briefs and here today, the reasons why we believe we're complying as well.

With respect to the separation of powers question, it's clearly been settled by Supreme Court precedent that military commissions have been recognized and approved by Congress, and the Supreme Court said that numerous times.

But one point I didn't make in my earlier presentation is it is also of course our position that Eisentrager is still the law regarding the substantive constitutional protections that are available to an alien enemy combatant being detained outside the United States, and therefore, an alien enemy combatant, if he cannot, can't invoke individual rights within the Constitution, he can't try to derive some individual right from the structural protections in the Constitution either, and that's another reason the separation of powers claim fails.

With respect to the Army regulation, it's again, we're talking about, regardless of its enforceability, I don't see how it translates into an ability to get any kind of immunity from trial, but it's meant to be policy, basically setting out guidance to the Executive Branch. It does not constitute implementing legislation of the treaty and is not enforceable in a habeas petition.

With respect to the speedy trial, I just clarify that Mr. Hamdan was moved to Camp Echo in December of 2003, and the purpose for doing that was to facilitate his access to counsel at the time. Based on operational and security determinations that it was decided that that was the best way to enable to precommission detainees to get access to counsel, was by housing them in a separate facility.

In conclusion, the President has convened military commissions pursuant to his own powers as commander in chief and the authority Congress has given him in the authorization to use military force, which the Hamdi plurality recognized has triggered the President's war powers in this conflict. He also invoked Section 821 of the UCMJ, which the Supreme Court has repeatedly said embodies Congress's recognition and approval of the President's use of military commissions.

Petitioner does not establish any pressing need for this Court to intervene at this time. For that reason, we ask this Court to abstain until the military proceedings are completed.

Thank you.

THE COURT: Thank you, Mr. Marcus.

It's a good thing you're getting up, Mr. Katyal, you left your watch on the podium.

MR. KATYAL: I did. Thank you, Your Honor.

I was going to just make a couple of remarks about your questions about Vietnam and Korea, and then move to abstention, and then turn it over to Commander Swift for a couple remarks.

With respect to Vietnam, the Pentagon studied it, as I understand it. This is written down in an article by Jordan Paust in the Michigan Law Review, and the Paust article quotes a Pentagon report from the Nixon administration at the time, which concluded that the Uniform Code of Military Justice and all of its incumbent protections applies to courts martial, and also concluded that the United States Constitution applies to military commissions, and also concluded that the Constitution governs military commissions. This was the conclusion of the 1970 Nixon Pentagon report.

They also said something else which bears on the amicus brief by the Washington Legal Foundation, and this is quoted in our brief. They said they thought, in their opinion, it was best for the Federal Court to decide these matters in advance, rather than to go through the process of a military commission, once you've had these earth shattering changes with the Uniform Code's adoption in 1950 and the Geneva Conventions in 1949 and 1955, that it would make the rules clearer for everyone involved, they said, both the people who face commissions, as well as the government.

With respect to Korea, as I understand it, it was discussed that commissions would be used. Indeed there was

even a written report, which is quoted in a textbook by Jordan Paust, about the rules that would govern a military commission. Those rules said explicitly, the rules of courts martial will govern military commissions. That's been the standard rule throughout time. It is the rule that's even cited in their own work like the Winthrop treatise and things like that.

With respect to the Uniform Code's adoption in 1950, you were asking a couple of questions about how this might have altered the legal landscape of commissions. We have two views on that, two different provisions. First is the enactment of Section 836, we believe modified the President's ability to enact military commissions, so that it can only be if it's not inconsistent with other parts of the code, courts martial and the like.

The other is that when they enacted the Uniform Code of Military Justice, they changed several provisions to say that the code would only apply in cases of declared war, and that is the Avarette case that we referred to, as well as there is some discussion about Article 38 of the Articles of War being modified to make this clear.

THE COURT: Tell me something. Do you think the courts martial under the uniform code could be adapted or flexible enough to deal with the specific problems that the government faces when it's trying people who are alleged terrorists?

MR. KATYAL: Absolutely, Your Honor.

THE COURT: Tell me how.

MR. KATYAL: Absolutely, Your Honor. We believe that there's zero national security implication to this case because everything that can be done in a military commission can be done in a court martial. That is, to the extent they stand up and say: Well, we need to modify this procedure, that procedure, whether it's rules of evidence or the like, the provision that they would use to modify those very rules is

Section 836, the very same provision that they stand before this Court and say allows us to modify court martials and change--and modify military commissions and change the rules, applies concurrently to courts martials. It's the exact same provision.

And so whatever is sauce for the goose is sauce for the gander.

THE COURT: Describe what you think--let's see, just taking Commander Swift's--you would have a different kind of judiciary. You would have the independence, whatever it is, of courts martial. Even though military officers are in it, they're command independent, and there are levels of review that are independent.

MR. KATYAL: Exactly.

THE COURT: You would have the ability of the general court martial to rule on case dispositive motions without having to go to a different level.

MR. KATYAL: Again, Your Honor, I'm not sure exactly what things the President has changed for reasons--in the commission process to deviate from the code for reasons of national security or the like. It's hard for me to stand up and say: Well, this should be done or that should be done. Our point is that the President hasn't explained why these changes, these deviations from the commission, from the ordinary rules for court martial are necessary in the commissions, but if they are, all of those changes can be done under the very same authority, Section 836, that they stand up and say allows them to escape the rules of courts martial.

THE COURT: What would it gain you if you had something called a court martial that looked like a court martial and all of these changes that they've made were made?

MR. KATYAL: Exactly our point, Your Honor. Military commissions are creatures of necessity. They've been used in places in which courts martial wouldn't exist for one reason

or another. But they've always applied the rules of courts martial. So if you look at Winthrop's treatise, and it talks about the rules of commissions in the Civil War, or if you look to the other studies of commissions that have been done, they all say the rule is to use court martial rules.

The reason why commissions exist has much more to do with geography and the fact that the Congress's statutory ability didn't extend at that notion in time outside the United States, and so there needed to be some other way to have military justice on the battlefield at a time of necessity. They still applied the same rules.

And so our point is they can stand up and use--if they want to stand up and say military commissions are necessary in Points A, B and C, in time, those very commissions applied the standard rules for courts martial, and the uniform code, in Section 836, I think makes that clear. To the extent the President wants to deviate, he's able--

THE COURT: I'm not--well, go ahead. Go ahead and finish that sentence.

MR. KATYAL: To the extent the President wants to deviate--and we're not sure that he can under the way Section 836 is limited, but it would apply symmetrically to courts martial and commissions. There's no extra power the President gets by calling something a commission that he doesn't get from court martial.

THE COURT: Fine. But we're not communicating or I'm not communicating. Suppose that instead of a military commission we had a court martial convened under the Uniform Code of Military Justice, but then also suppose that the President concludes that to bring a terrorist, a person he believes to be a terrorist, a person he believes in league with 500 others in Camp Delta, into a hearing to hear the evidence against him, would seriously infect the rest of the prisoner population. And so he decides, the President or who is ever making up these rules, he decides that the defendant will not have any right to be present when proceedings are against

him, and his attorney will have access to information that he is bound by his oath and by his commission not to reveal to his client. Would that be acceptable to you? It's called a court martial.

MR. KATYAL: Yes.

THE COURT: In every other way it's the same, but that's the rule for security.

MR. KATYAL: And if the President makes such a showing under 836, that's absolutely fine to us. Our point is whatever the President can do that they say is necessary to do in a commission, he can do in a court martial. I can't stand before you and say that I've worked out what the President's grounds for necessity are in any given case, but court martials are closed all the time for specific classified information. We've had court martials in any number of battlefield situations, Kosovo, Iraq and the like, and they've dealt with highly sensitive information.

Our point is that a commission traditionally gets something that a court martial doesn't, which is, you know, an escape from the number of members or something like that on a battlefield that might be necessary to hear a case. So if you can meet some kind of technical requirement of the court martial in the immediate necessity, that's when you use a commission.

You don't use a commission in a kind of three-year calculated process that involves civilians when you bring people halfway across the globe. That undermines the case for necessity. Commissions are creatures of necessity.

THE COURT: Am I hearing you correctly? What you're saying now is the President simply hasn't explained clearly enough why he has to use this commission.

MR. KATYAL: Our point is that the President has to use--that there is no authorization for the commission as such. There is authorization for a court martial, and if they wanted to have a proceeding in which the rules of court

martials were ordinarily followed, granting that there may be specific deviations from Section 836 for the needs you talk about, which would occur in a court martial, that would be fine.

THE COURT: That would be fine if not only would he not have the right to be present during proceedings against him, but if he didn't have the right to confront live witnesses, that hearsay could be used as long as it was reasonably probative, would that be okay with you?

MR. KATYAL: Your Honor, I'm not sure about the international law implications of that, so I'm going to defer to Commander Swift on those questions if that's okay.

Let me just say--

THE COURT: I'm surprised you didn't feel the tug at your coat.

[Laughter.]

MR. KATYAL: Okay, thank you.

MR. SWIFT: Under the Uniform Code of Military Justice, Your Honor, I'm going to answer some of those questions. Professor Katyal was not particularly familiar in that area.

What would he get? All the things that I complained about, absolutely he'd get them. He'd have an independent judiciary. He'd have a military--a military commander would convene it. There would be an Article 32 hearing. I'm presuming they want more than a year to sentence the person for. Whatever he's charged with would have a maximum, it wouldn't have--you know, currently under the commissions, how you know it's a death penalty case is there are seven people sitting there. That's the only notice you get. You would have a set statute. He would have the right to represent himself. You'd have the right to confront the evidence against you.

The rules of evidence, the Federal Rules of Evidence have been adopted. I don't know that I agree necessarily with

Professor Katyal that you could, in limited circumstances, deviate from them. That's an interesting question. But I also know that military judges in court martials are extremely flexible to battlefield evidence. We are trying cases in battlefields right now, and I don't think that there's going to be that particular stay. Certainly they've permitted testimony from around the world. Most importantly--via satellite or other means.

Most importantly, however, the military--the court martial has the ability to be closed. That's the security issue. We've never run into the same problems in court martial that you run into here in closing down the force.

THE COURT: Handling confidential information.

MR. SWIFT: Handling confidential information. All the jurors are easily--you can select jurors who all have secret clearances. You know, you can close the court martial down. That's clear under the rules of court martial that you can do that.

What you wouldn't be allowed to do is what they're arguing, to exclude him. It's notable that although Quirin was a national security case, Your Honor, they didn't exclude the Quirin detainees. They got to come to their own hearing. Mr. Hamdan doesn't get to come to his. Under a court martial, you'd have to be able to do that.

THE COURT: Are you telling me he won't even be able to come to his own trial?

MR. SWIFT: That's correct, sir. He already has been excluded from voir dire. He didn't get to listen in on that for a significant portion of it, and the government's already indicated that for two days of his trial, he won't be there. And they'll put on the evidence at that point. He'll be ably represented by me. As I point out, sir, my problem is I won't be able to ask him about anything that went on there. And under a court martial, that couldn't happen. It simply can't. And the process will work not only to the American people's

interest, it will stand up in any judicial test. It has for 50 years.

Thank you, sir.

THE COURT: All right. Thank you. I think we've come to, if not the end of everybody's time, we've come to the end of everybody's rope, so--yes, Mr. Marcus? You want a last word?

MR. MARCUS: One quick point I wanted to make regarding the timeframe for the review process. The review panel is given 30 days to review the commission's ruling, and while there is no specific timeframe assigned to the review by the Secretary of Defense or the President, and the President could designate the Secretary of Defense as the final decision maker, I think it's fair to say that neither of them would have any interest in delaying finalizing the commission judgment. That's all

Thank you.

THE COURT: Well, I want to thank all counsel for excellent presentations. The matter is submitted, and I will rule as quickly as I can. Thank you.

We're adjourned.

[Whereupon, at 3:48 p.m., the hearing was adjourned.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Salim Ahmed Handan, Petitioner, v. DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States, Respondents.	Civil Action No. 04-CV-1519 (JR)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that respondents/defendants in this case, George W. Bush, President of the United States; Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; and Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo

Bay, Cuba; hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's Order entered and filed November 8, 2004, and all earlier rulings and interlocutory orders that gave rise to and/or produced that order.

Dated: November 12, 2004.

Respectfully submitted,

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TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN, Petitioner-Appellee, v. DONALE H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL., Respondents-Appellants.	No. 04-5393

Thursday, April 7, 2005
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES RANDOLPH AND ROBERTS, AND SENIOR CIRCUIT JUDGE WILLIAMS

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

PETER D. KEISLER, ESQ.

ON BEHALF OF THE APPELLEE:

NEAL K. KATYAL, ESQ.

CHARLES D. SWIFT, ESQ.

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PROCEEDINGS

THE CLERK: Case No. 04-5393, Salim Ahmed Hamdan v. Donald H. Rumsfeld, United States Secretary of Defense, et al., Appellant. Mr. Keisler for appellant; Mr. Katyal for appellee; Mr. Swift for appellee.

THE COURT: Good morning.

ORAL ARGUMENT OF PETER D. KEISLER, ESQ.
ON BEHALF OF THE APPELLANTS

MR. KEISLER: Good morning, Your Honor, and may it please the Court. This case concerns the lawfulness of the military commission procedures that were to be used to try the petitioner, Mr. Hamdan, who has been identified as a former bodyguard and driver of Osama bin Laden and who has been charged with conspiracy to attack civilians, to engage in acts of terrorism, and to commit other offenses against the laws of war.

To date, only 15 individuals have been designated by the President as subject to his order on military commissions, and of those, only four have had charges specifically referred to a military commission. This is not a procedure that has been broadly applied to the general population of detainees at Guantanamo Bay. But in Mr. Hamdan's case, the President determined that there is reason to believe that he was associated with al Qaeda or otherwise involved in acts of terrorism directed against the United States and specific charges in that regard were then referred to a commission. Those commission proceedings, in turn, were halted literally in the middle of hearing argument on one of Mr. Hamdan's motions by the District Court order from which we're now appealing.

The District Court determined that notwithstanding the fact that these proceedings were in their very early pre-trial stages, that this was nonetheless an appropriate time for judicial review and intervention and proceeded to issue a

series of rulings broadly disapproving of the determinations the President and his designees had made.

Specifically, the District Court held that al Qaeda, which is not a signatory to the Geneva Conventions and which openly defies Geneva's principles, is nonetheless entitled to Geneva's protections. It further held that Mr. Hamdan, who vigorously denies that he has had any involvement with any hostilities of any sort, is nonetheless provisionally entitled to prisoner-of-war status. It further held that these claimed entitlements under Geneva are enforceable against the United States by U.S. courts at the behest of captured detainees. And it held that, in any event, the military commission procedures were unlawful not because they failed to follow the provisions of Title 10 that are addressed by their terms to military commission procedures, but because they don't also comply with the far more numerous statutory provisions that are addressed by their terms to court martial proceedings.

We disagree with each of these rulings, but we think the first error the District Court made was in addressing those issues at all, because we believe the proper course was for the District Court to dismiss the case on the basis of abstention. And this we emphasize is completely an issue of timing. There's no question at the end of the day, at the end of commission proceedings, if Mr. Hamdan is convicted, he will have the opportunity to file a habeas petition and advance and have resolved whatever cognizable claims he chooses to make. But we think it was highly premature for the District Court to decide these issues at this very early stage of the proceedings.

The District Court acknowledged, but then declined to follow --

THE COURT: What do you do with *New v. Cohen*, where we -- the challenge here is jurisdictional, isn't it? And didn't we say in *New* that there's an exception for the abstention doctrine when it's a jurisdictional challenge?

MR. KEISLER: I think quite the contrary, Your Honor. Both *New v. Cohen* and *Schlesinger v. Councilman* were cases in which jurisdictional claims were raised to the jurisdiction of the military tribunal. Nonetheless, in New the Court abstained and dismissed; in *Schlesinger*, the Court abstained as well.

The jurisdictional exception insofar as it exists to *Councilman* abstention is much, much narrower than that, and it's reflected in cases like *Reid v. Covert* and *Toth v. Quarles*, and those were the cases that this Court was addressing in *New*.

Those cases don't stand for the proposition that there is a general exception to *Councilman* abstention whenever someone raises a jurisdictional claim. Those cases stand for the proposition that when a civilian citizen raises substantial arguments that the military has no jurisdiction to try him or her at all, and in those instances abstention is inappropriate because a citizen has constitutional rights that could be violated by subjecting --

THE COURT: Counsel, you don't have a precedent, though, involving military commissions in which the Court has abstained, do you?

MR. KEISLER: No, these precedents all involve courts-martial, but they don't turn, in our judgment, on the fact that it's a court-martial as opposed to a military commission. The fundamental --

THE COURT: Well, *Quirin* was a military commission and the Court didn't abstain.

MR. KEISLER: It didn't abstain there. That was before *Schlesinger*. Decades before *Schlesinger v. Councilman*, Your Honor, and *Quirin* was a very unusual situation. They were days before what everyone understood to be a likely execution in the middle of a summer session of the Supreme Court. Phone calls were made to the homes of the Supreme Court Justices, an emergency session was convened in order

to deal with what was regarded at the time as an extremely imminent situation.

But I don't think the fact that the cases involved courts-martials rather than military commissions is material, Your Honor. The fundamental insight of those cases is that the military in implementing the military justice system has specialized needs, and they need a certain amount of room and latitude and autonomy in the first instance to implement those procedures. Not that there won't be opportunities to challenge them, but that those opportunities come at the end. Because it undermines the effectiveness of the disciplinary process for the subjects of that process to have advance or interim piecemeal recourse to an Article 3 Court to correct individual errors along the way.

THE COURT: You have -- you make the point that the government didn't argue for abstention in *Quirin*. Why are you arguing for it here? I would have thought, given the status of this proceeding, the length of time involved, that you'd welcome a sort of determination of the threshold question of whether or not the commission can go forward or not. But --

MR. KEISLER: Well, I think -- you know, in certain respects I suppose we might welcome a holding that these commissions are lawful and permitting us to go forward on that basis. But overall, the principle that these proceedings should be allowed to proceed unabated until the end and that that's the proper point for judicial review is ultimately the more important point for us.

And this really is just like the court-martial cases, because --

THE COURT: Does that apply no matter when the proceeding takes place? I mean, let's say this is five years from now when the claim is raised. I mean, is there a point in time at which the abstention argument weakens to the point that the Court ought to consider the habeas claim?

MR. KEISLER: It's an equitable argument and as time goes on, I think our claims for application of an equitable doctrine would grow weaker; particularly if the Court thought we were manipulating the situation in some way or causing delay for an unreasonable reason. But we're certainly not at that stage here. Mr. Hamdan was captured in 2002, he was designated by the President's order in 2003, charges were referred in 2004. We were prepared to go forward. The only reason things have stopped are because of the injunction that we're appealing from. We'd like to go forward.

THE COURT: How can we abstain on the argument that based on 102 of the Convention and Article 36 of the Uniform Code, under which as I understand it Hamdan is claiming, as a civilian subjected to a court-martial might claim, that he is being tried by a completely different kind of body from the sort of body that can lawfully try him? Why isn't that a close parallel and, therefore, requiring adjudication now, where it's sought now?

MR. KEISLER: Well, the only cases I think they could claim it is parallel to would be *Reid v. Covert* and *Toth v. Quarles*, but those cases are different in two critical respects. One is those involved the constitutional rights of citizens. Mr. Hamdan is not a citizen. He has no property or presence in the United States --

THE COURT: I mean that goes to the character and perhaps the strength of the substantive claim, but the -- it seems to me it's jurisdictional character as a totally unsuitable type of tribunal seems to be the core link.

MR. KEISLER: But the claim in *Reid* and *Toth* was that the military had no jurisdiction over these people at all. That's not the case here. There's no question that the military has jurisdiction over Mr. Hamdan. *Johnson v. Eisentrager* said that the military's jurisdiction over those charged with violating the laws of war is well established. Even the District Court's opinion, which is quite broad and sweeping, and even if it is affirmed in all respects, it only goes to the

type of military proceeding and the procedures under which Mr. Hamdan will be tried. It doesn't raise the question that was raised in *Reid* or *Toth* where you had a citizen who said I have a right not to be tried by the military at all. And that right -- I think I would differ, Your Honor, with the notion that it just goes to the strength of the substantive claim.

The whole basis of Justice Black's decisions in those cases were that these were people with constitutional rights to trials by jury and rights under the due process clause that could be violated merely by subjecting them to a military proceeding when they, instead, had a right to be subjected, if at all, to a civilian domestic court. That doesn't apply here at all. We don't think those cases are applicable and we don't think the court-martial -- the fact that those cases involved court-martial distinguishes this at all because fundamentally both of these proceedings involved the ability of the military to enforce discipline.

Schlesinger is internal discipline against service members; this is external discipline. Part of the incident of the conduct of war is sending the message that if you commit terrible crimes, we will capture you, we will give you a fair trial, and if you're found guilty, you'll get a fair sentence that's appropriate to what you've done. That is a function of the --

THE COURT: Does it make a difference to your abstention argument that we have claims here under the Convention as opposed to under the Constitution?

MR. KEISLER: I don't think it makes any different at all. I think the abstention doctrine applies across the board to decisions that would interfere with ongoing military proceedings before those remedies have been exhausted.

But maybe I should turn then, Your Honor, to the merits issues and I'll start with the first holding of the District Court, which is that Mr. Hamdan was entitled to presumptive prisoner-of-war status and to a hearing before an Article 5 Tribunal under Geneva, and if that Article 5 Tribunal

determined that he had POW status, he would then be immunized from trial by military commission.

We think there are several different dispositive flaws with this holding; any one of which would be grounds for reversal. But the one that we think cries out most for correction is the holding that members of al Qaeda captured in Afghanistan are entitled to the protections of Geneva. Al Qaeda is not a signatory to the Geneva Convention and this isn't simply a question of someone's name on a signature block. They openly defy all the principles of Geneva and under those circumstances, they can't be legally entitled to its protections, because the essence of the treaty is reciprocity.

THE COURT: Is he under the custody of the Army or the Navy?

MR. KEISLER: The Department of Defense as a whole; not a specific service, Your Honor.

The essence of the treaty is reciprocity. Adherents to the treaty accept very significant limitations on what they may do militarily. They can't target civilians even when doing so would advance military objectives. They can't blend in with civilian populations. They have to wear recognizable signs and carry arms openly, even though that puts their troops at greater risk and greater exposure.

And they do this, in addition to the moral reasons, because they have the incentive to do so because then their troops are entitled to the protections of Geneva if they're captured, and combatant immunity.

THE COURT: The Viet Cong were given protection under the Geneva Convention.

MR. KEISLER: Excuse me, Your Honor.

THE COURT: The Viet Cong; weren't they?

MR. KEISLER: That we gave them protection under Geneva? If that's so, it was --

THE COURT: They weren't wearing insignia.

MR. KEISLER: It may then have been a discretionary act that we were not required to do. But in terms of the legal entitlements, nobody who defies Geneva is entitled to its protections. And Geneva --

THE COURT: What about Article 3? As I read Article 3 of the Convention, it's sort of a mop-up provision, which acknowledges that there will be class of persons who, because of the failure of their government, if they have any government -- of course in this case there isn't -- if they have any government, that the government has failed to sign on to the Convention and provides a sort of minimum level available to absolutely anyone.

MR. KEISLER: I don't think that's true, Your Honor, for two reasons. The first is common Article 3 says specifically that it applies to conflicts not of an international character and --

THE COURT: No, but the commentary says that you don't have to worry about that. I'm not sure if the commentary is controlling, but there's a certain logic in favor of the commentary on that point.

MR. KEISLER: But the focus was at the time this was drafted was covering civil wars and other incidents that are internal to a single signatory rather than involving both signatories.

But even if common Article 3 has the meaning that Your Honor's just ascribed to it, that doesn't change the coverage of the Convention, which is determined by Article 2. Article 2 says this Convention, meaning the entire Convention, applies to conflicts between two High Contracting Parties such as, for example, the United States and Afghanistan. And the last paragraph in Article 2 goes on to address the precise circumstance that we have here. When you have a conflict that involves multiple parties, some of which are High Contracting Parties and some of which are not, and what the last paragraph says is that when you have a conflict involving High Contracting Parties and some other power which is not

a signatory to the Convention, then the High Contracting Parties are bound to the Convention in their mutual relations; between the United States and Afghanistan, for example. But that they are bound to it as to the non-signatory party only insofar as that power itself accepts and applies the Conventions, as al Qaeda, of course, does not.

THE COURT: I understand your reading on that. But, the role you've left for Article 3 seems to be much less than it plausibly can claim.

MR. KEISLER: Well, I think it applies to civil wars and other conflicts of a non-international character. The District Court took the view I think not that Article 3 by its terms applies to this conflict, because clearly this is a conflict of a broadly international character. The District Court took the view that it acquired the status of customary international law. And that, I think, is implicit in Your Honor's question. It's a mop-up, it's a catch-all, it's the minimum guarantee for all situations.

But even if that's true, customary international law, the Supreme Court said in *Paquete Habana*, can never override a contrary legislative or executive decision.

THE COURT: Well, this takes us to the general question of the ability -- the self-executing character or not of the Convention.

MR. KEISLER: Although I think --

THE COURT: I'm assuming we don't even get to the discussion you and I are having unless we make that assumption in favor of the appellee.

MR. KEISLER: I think that's right, but I think what that means then is that status of customary international law can't itself, standing alone, override the President's decision. It applies only insofar as the Convention itself applies to this conflict and is self-executing, or at least creates judicially enforceable rights --

THE COURT: Before you go further, can you tell me what is it that the petitioner here would receive in a court-martial that he wouldn't receive in a trial by a military commission?

MR. KEISLER: The particular omission that was focused on in the District Court was that there is a procedure which potentially contemplates when evidence is presented that Mr. Hamdan would be excused and would not be able to be present for the entirety of the proceeding. Whether or not when evidence --

THE COURT: So there would be an in camera presentation of evidence, is that the idea?

MR. KEISLER: Well, the detailed defense counsel would be present and would be able to participate fully, but the notion is that if there are circumstances in which classified information needs to be introduced to which he cannot be exposed, he would be excused from that portion of the proceeding --

THE COURT: Why is that a difference? Doesn't the Geneva Convention also contemplate secret proceedings? Article 105 says that the court may hold in camera proceedings when state secrets are at stake.

MR. KEISLER: I wasn't aware that Article 105 said that, but certainly our tribunals under Article 5 --

THE COURT: Well, if there's no difference -- I mean, are there any other differences? It says that you can have proceedings held in camera in the interests of state security. Article 105 of the Geneva Convention.

MR. KEISLER: We haven't asserted Article 105 and I'm not certain what the precise scope is, but in terms of whether there are other consequences, the holding of the District Court is that the entirety of the UCMJ applies to these proceedings. The UCMJ Section 836 authorizes the President to proscribe rules for courts-martial, military commissions, courts of inquiry, and so forth and says they may not be

contrary to or inconsistent with anything in this chapter. And then you have a series of provisions, as Your Honor knows some of which deal with courts-martials and military commissions, some of which deal only with court-martial, some of which deal only with courts of inquiry. And what the District Court held is that all of those provisions, regardless of which particular type of proceeding the provision is tagged with, all of those provisions apply to everything. Every --

THE COURT: Let me go back -- let me just go back to this confrontation-type clause. The Supreme Court in *Hamdi* as well -- at least Justice O'Connor's opinion said that hearsay evidence can be introduced. Now, that would otherwise be a violation of the confrontation clause. The Supreme Court held in the Crawford case that you can't use -- in limited circumstances, but generally you can't use hearsay evidence; it's a violation of the confrontation clause, and the Supreme Court in *Hamdi* said you can do it.

MR. KEISLER: In *Hamdi*, Your Honor, it was a case involving a United States citizen. A fortiori what was permissible with respect to *Hamdi* is certainly permissible with respect to Mr. Hamdan. And I think it would make nonsense of all the care with which Congress took in Title 10 to designate this provision relates to courts-martial, this provision relates to military commissions; just throw that out and say the whole thing applies to everybody --

THE COURT: It's not clear to me if Hamdan raises the issue because there are two sort of stray sentences in the brief on the subject, but why don't Articles 49 and 50 of the UCMJ apply to military commissions? At least they don't seem to be expressly limited to courts-martial and they seem to manifest a confrontation clause set of assumptions.

MR. KEISLER: Articles 849 and 850 do apply to military commissions and they relate to some very specific types of evidence that might be introduced. Eight-fifty relates to introducing records from courts of inquiry; 849 relates to introducing depositions. We don't know in this proceeding

whether or not we're going to be introducing any evidence of that sort yet. If we do, and if some procedure that seems to be contemplated by the regulations would conflict with 849 or 850, Mr. Hamdan's counsel can raise the objection at the time, the tribunal could consider it, and the commission, you know, would so rule if the procedure was inconsistent with the statute that it couldn't be done. And that's --

THE COURT: But you're reading both those sections; not to embed a general notion of a right of confrontation. If you can't introduce it at deposition except under meeting certain criteria, it would seem a little odd if you can have some complete end run around it which sounds like at least some of the descriptions of what the government may contemplate here.

MR. KEISLER: Because there is specifically another provision of the UCMJ which addresses specifically the right to be present, and that specific provision addresses its application to courts-martial and makes no mention of military commissions; we would read 849 and 850 as focused on the particular specific circumstances to which they're addressed.

But I would point out, I don't think -- I could stand corrected on this, but I don't think Mr. Hamdan has, in fact, raised this argument. It was raised by an amicus brief by People for the American Way --

THE COURT: Well, there are two sentences in the red brief on the subject.

MR. KEISLER: Maybe there are. It seems to me, Your Honor, this is an issue which, if anything does -- and we think it all does -- but if anything does, cries out for abstention. Because even when the right to be present is violated in a domestic court violating the Federal Rules of Criminal Procedure and the Constitution, it's subject to harmless error analysis. The Court looks at it at the end of the day and makes a decision as to whether or not in the whole context of the proceeding given what was going on when the

accused was excluded and what other evidence was introduced, there was any violation of a right here. We don't think there's any violation of a right here. We think all the provisions that apply to military commissions in Title 10 are being complied with.

But if there's any question that that's not going to be the case, the end of the proceeding and not the beginning is the time to discuss that.

THE COURT: Did I understand you correctly that there's no representation that evidence that would be classified top secret necessarily will be introduced before the commission in this proceeding?

MR. KEISLER: We don't know yet, because the trial hasn't begun. The one thing that has happened is that Mr. Hamdan was excluded from part of the voir dire when his military defense counsel was permitted to question members of the tribunal about specific classified duties that they engaged in to determine whether any of the duties that they engaged in might give grounds for challenging them for cause. But with respect to evidence, no decision has been made as to whether or not to use classified evidence.

And if a decision is made that some classified evidence needs to be used, there are procedures that might create an accommodation. The regulations contemplate discussing using a unclassified summary. If we can't first get the matter declassified, we can try to use an unclassified summary the way CIPA envisions and if we can --

THE COURT: Are there precedents in court-martial proceedings where top secret classified information was introduced, and how was that handled?

MR. KEISLER: Military Rule of Evidence 505 adopts a procedure something like CIPA. We do protect completely the right of the accused to be present in court-martial proceedings under Section 839, so we don't have a procedure there in which they can be excused. We think the line should

be drawn in a somewhat different point here, and I would just emphasize the surpassing importance here of protecting sources and methods. We've never had a conflict in which intelligence was as important as it is in this conflict. It's always been important, but this is a conflict in which we don't know exactly who the enemy is, we're not fighting over specific territory, they could strike anywhere at any time at any of our interests across the country and the world. It's never been more important that we find ways to protect security of intelligence information, and what we've tried to do here is create a situation which balances that need against the undoubted rights of the accused.

And so what we've done is created a situation where we will first try to get any information we want to use. If there is any such information, declassify it. If we can't, we will work with the defense and the military commission to create some sort of unclassified summary. If we can't reach agreement on that, then yes, it's true Mr. Hamdan could be excused and it would be left to his defense counsel to represent him at the proceeding with the evidence that's introduced.

But even then, at the end of the day, the regulations say that the military commission must consider in deciding what weight, if any, to give to the evidence whether there was an opportunity to test its veracity. And --

THE COURT: Counsel, could I get you to focus a little bit on the judicial enforceability question? Why doesn't the habeas statute with its specific reference to treaties fill that void? In other words, even if the treaty itself doesn't provide an individual -- I call it cause of action or right to judicial enforceability -- the habeas statute does, the treaty simply provides the law that's going to be applied.

MR. KEISLER: Because the habeas statute doesn't convert treaties that are not judicially enforceable to ones that are any more than it converts a statute which has a provision, this statute creates no judicially enforceable rights into one

that does. And we know that from *Johnson v. Eisentrager*. *Johnson v. Eisentrager* was a habeas case.

THE COURT: Well, you know that from the footnote in *Johnson v. Eisentrager*. You don't know it that much from the text.

MR. KEISLER: That's right, but the footnote does represent the considered judgment of the Court on the precise kind of issue we're discussing.

THE COURT: But then in the text, the Court went on to a purely gratuitous act of analyzing the claims under the Convention. If the footnote were binding and the Convention provided no judicially enforceable rights, that should have been the end of the case.

MR. KEISLER: That whole section of the opinion was -- to use Your Honor's phrase -- a purely gratuitous act. *Johnson v. Eisentrager* is an opinion filled --

THE COURT: Well, one of the two was; the text was or the footnote was.

MR. KEISLER: Well, no I'm saying the whole section addressing the merits at all because the Court had earlier held that there was no right to file a habeas petition at all. This Court in *Al Odah* said that *Johnson v. Eisentrager* can either be viewed as a series of alternative holdings or dicta, but whatever it is, it is the considered judgment of the Court on that question.

And it's not the only Court to address this issue. We have many Court of Appeals cases, which we've cited on page 15 of our reply brief, in which people have come into court and alleged violations of the International Covenant for Civil and Political Rights and said exactly what Your Honor just said. This is a treaty, the habeas statute says treaties, they violated this treaty, I have a right to pursue the claim.

And what the Court has said is if the ICCPR doesn't create judicially enforceable rights, as it doesn't, then the habeas --

THE COURT: Well, but wasn't there a reservation with that treaty?

MR. KEISLER: There was a specific reservation --

THE COURT: There was a reservation that said this treaty is not intended to change domestic law or something.

MR. KEISLER: That's right, and so it's more clear in that circumstance than perhaps a circumstance where you don't have such a reservation. But I was simply making the point that a habeas statute doesn't override that. If you look at a treaty and using whatever judicial tools of treaty construction you use, determine that it's not judicially enforceable, then having the habeas statute out there to create a cause of action doesn't make it judicially enforceable any more --

THE COURT: But isn't that approached -- I mean, your friend on the other side suggests that that approach is used too much because these treaties apply to different countries, all of which don't have the same sort of judicial system that we do. So, it would be surprising to find in the treaty sort of references to judicial enforceability that you seem to insist upon.

MR. KEISLER: Well, to begin with, there is a presumption -- a background presumption with respect to treaties that they are compacts between nations, as the Court said in the *Head Money Cases* and that they are enforced principally by state-to-state negotiations and other diplomatic and similar mechanisms.

In this case in particular, looking at the Geneva -- for a moment assume that the Supreme Court hadn't considered the issue in *Johnson v. Eisentrager* and we were looking at it fresh. There was a lot of discussion about enforcement, and a lot of attention paid to enforcement by the drafters and negotiators and ratifiers of Geneva. And all that attention focused on non-judicial means; on strengthening the rôle of protecting powers, on strengthening the role of the

(indiscernible) proceeding to resolve disputes. There was some discussion --

THE COURT: Well, the reason is because they're dealing with, they'd hope, as many countries as possible, most of which I suppose don't have a judicial system of the sort that we have and so it would have been odd to put in the treaty you enforce this in courts if they're dealing with people that have a different legal enforcement mechanism altogether.

MR. KEISLER: But, Your Honor, that's precisely the point. All the mechanisms that they adopted were mutual and reciprocal. Everyone could come to it the same way. It existed the same way for everybody. There was discussion about referring cases to the International Court of Justice, but that was rejected, but that also would have been one institution that everyone could come to.

The essence of these treaties is reciprocity and you can't have reciprocity and mutuality in a situation like this. It really doesn't make sense to say the Taliban soldiers captured by the United States will have recourse to American courts and then in return American soldiers captured by the Taliban will have Taliban courts. Precisely for the reason Your Honor said; there's such a variation in the independence and maturity and fairness of the different judicial systems in all the signatory countries. That is not the kind of mechanism this treaty would have envisioned to enforce its terms.

THE COURT: You haven't mentioned Army Regulation 190-8. That's still in effect, isn't it?

MR. KEISLER: It is still in effect.

THE COURT: And it says all persons taken into custody by U.S. forces -- not just Army, but U.S. forces -- will be provided with the protection of the Geneva Convention until some other legal status is determined by competent authority. Is it your claim that the President of the United States is competent authority?

MR. KEISLER: Well, it's certainly our claim, yes, that the President is competent authority on everything, but specifically to address Army Regulation 190-8. The language there mirrors the language in Article 5 and it makes --

THE COURT: Except Article 5 talks about a competent tribunal, which at least implies a group, a board, a commission. This Army Regulation says competent authority.

MR. KEISLER: Even taking -- I mean, competent authority now I think Your Honor is saying is broader than competent tribunal and could be satisfied in circumstances --

THE COURT: The commentary -- no, the commentary to Article 5 was changed. It used to read, I think, something like competent authority or responsible authority. Then in 1949 it was changed to make it a tribunal. It was changed purposely according to the commentary to have more than one person make the decision. But the Army Regulation is the same as the 1929 Geneva.

MR. KEISLER: But, Your Honor, whether it's the Army Regulation or Article 5 itself, it really couldn't be clearer that Mr. Hamdan has no entitlement to a tribunal of any sort, or to prisoner-of-war status.

You've been presented with two competing versions of the facts here, but under neither of them is there any story -- any coherent story under which he would be entitled or has raised any doubt about entitlement to prisoner-of-war status. Either it's the facts embodied in the President's decision and the charge in which he's an unlawful combatant acting in association with al Qaeda who doesn't remotely meet the four criteria of Article 4, or he is, as he contends, an innocent civilian who has had no contact with any hostilities, is a non-combatant and, therefore, is not in any way associated, again, with any armed force that meets the characteristics of Article 4.

An Article 5 Tribunal -- Article 5 says any doubt arises whether someone having committed a belligerent act is entitled to POW status. Mr. Hamdan denies that he's committed any belligerent act. Article 5 is about taking the universe of people who have committed --

THE COURT: Well, but people that go through court-martials are entitled to a presumption of innocence, and people in this commission are entitled to --

MR. KEISLER: Exactly right. And that --

THE COURT: So, if we presume at the outset that the person is innocent, we presume that they didn't commit a belligerent act and under your theory then, they're not prisoners-of-war.

MR. KEISLER: Well, you don't presume something that's contrary to an assertion if someone swears out in a complaint. You can plead yourself out of the claim and he has sworn that he's an innocent civilian. We don't presume the opposite.

But the point I think I was trying to make, Your Honor, is that an Article 5 Tribunal is not the place to resolve the kind of dispute we're talking about here. It's for sorting out people who've committed belligerent acts who are entitled to POW status, from people who've committed belligerent acts who are not entitled to POW status. The way you sort out the kind of dispute we have here, which is a dispute between whether someone is an unlawful enemy combatant who's violated the laws of war, or instead an innocent civilian who's a non-combatant. The place where that is decided is a military commission.

The capturing company charges the person with violating the laws of war, Mr. Hamdan raises his defense, he's entitled to the presumption of innocence, reasonable doubt standard, and the issue is decided.

THE COURT: We'll give you several minutes for rebuttal.

MR. KEISLER: Thank you, Your Honor.

ORAL ARGUMENT OF NEAL KATYAL, ESQ.
ON BEHALF OF THE APPELLEE

MR. KATYAL: Good morning, Your Honors. Your Honors, of the three issues before you today -- the main issues: abstention, the Geneva Conventions, and Mr. Hamdan's right to be present, I'll address the first two issues and my co-counsel, Cmdr. Swift, will take the right to be present. I'd ask that 10 minutes of our time be reserved for him to address that issue.

The government wants to make this case about judicial interference with Executive functions, but what this case is really about is Executive interference with the judicial function. Simply put, the essence of our challenge today is that this is not a system of law. There are no rules written in advance that predictably explain what's going to happen. The procedures can be altered at any time. The chair can literally be pulled right out of Mr. Hamdan -- right up from under Mr. Hamdan, and there is no authority for this commission. At the same time there are persistent attempts by the government to keep this case from the federal courts; the lengthy period of delay and the like.

Abstention, Your Honors, is justified when the tribunal to which abstention is sought has demonstrated its fairness, its expertise, and its independence. None of those can be said about this military commission. That is the essence of our federal challenge. And the government is asking you today to craft --

THE COURT: How many cases has this military commission adjudicated?

MR. KATYAL: The commission itself has not adjudicated any. The commission was set -- the President's order was issued in November 2001. We had asked for charges to be brought against Mr. Hamdan and we were told

we had no right to such charges; no speedy trial rights or anything of the like.

THE COURT: So, your claim that they haven't demonstrated their competence and fairness is not very fair, is it? They haven't had a chance to.

MR. KATYAL: Well, Your Honor, the test is not -- the test in the abstention jurisprudence is not might they hypothetically demonstrate fairness. It's do they have a proven track record or at least do they have a system of structural safeguard in place that makes abstention an appropriate thing. Here -- this is not like a court-martial. This is not like a state criminal proceeding in which you have the presumptions of fairness and the track records of fairness. Here you have none of that.

And so you are abstaining -- you are being asked to abstain to a tribunal that --

THE COURT: You don't have that with respect to the particular procedures in this case, but you do have historic acceptance of military commissions.

MR. KATYAL: That's absolut --

THE COURT: *Quirin*, *Madsen*, the other cases.

MR. KATYAL: That's absolutely right, Your Honor. And this military commission differs from all of those on the main things that Judge Robertson reached on the merits. That is, the Geneva Conventions of 1949 and its Article 5 and Article 102 safeguards were not in place then. And *Quirin*, of course, as my co-counsel will explain, was a case in which the right to be present was guaranteed at all times. And indeed, Quirin was different for lots of other reasons as well; that is, there was an argument that the tribunal there was authorized because the charges that the Nazi saboteurs were tried by were specific ones that Congress had said were triable by a military commission, and had so since 1790; spying and aiding the enemy. Mr. Hamdan is charged with something else.

THE COURT: Let's suppose we took away some of the factors on which you rely and that there was an a priori set of military commission rules on the books and that the proceeding was commenced immediately upon Mr. Hamdan's capture and all. Would abstention be appropriate in that situation?

MR. KATYAL: It would be a much better case, of course. And I'm not sure exactly what a priori rules on the books means. I mean, the government has pointed here at least to a certain set of rights that they say Mr. Hamdan has, but the very order that they rely on to say Mr. Hamdan has rights, the last section of it says none of these are actually rights, none of these are enforceable in the commission or in subsequent proceedings, and none -- and that all of these can be changed and altered at any time.

THE COURT: I guess I'm just asking if there is any situation in which you think abstention in favor of a military commission as opposed to a court-martial would be appropriate?

MR. KATYAL: I think, Your Honor, if this were, for example, just a purely subject matter jurisdiction challenge as it was in *Councilman*, and you had all of the procedural safeguards in place that made it look like a court-marital, that would be a much better case. Here you have not only the lack of congressional authorization; you have the defiance of Congress. Because Congress has said that the Judge Advocate General is to review military commission proceedings and revise them accordingly. And we know in the Civil War that in the one instance in which the right to be present was denied, the Judge Advocate General overturned the military commission on that very issue.

The other thing about *Councilman* and the government's reliance on those -- that set of cases is that I think the discipline issues, Judge Roberts, are different. That is, in the military commission context you're not being asked on habeas review or mandamus review to interfere with

servicemen and their orders, you know what meals they may have and the like. And this Court in *New* said that was a particular concern that if you open the door to *New's* claim, then lots of stuff will come before the Court that shouldn't properly be there and interfere with military discipline. Here you don't have that set of policy concerns.

Rather, you have a situation, as Your Honor said, in which there's been a lengthy period of delay of three-and-a half years while Mr. Hamdan has been in solitary confinement for 10 months. And it may be that in some circumstance with some limited set of claims abstention is an appropriate doctrine. This is not that case. Abstention is, of course, the rare exception and the norm is that the federal courts should exercise their jurisdiction whenever they can.

THE COURT: In the next military commission if the prosecution announced that no classified information was going to be introduced, would you say abstention was not proper still?

MR. KATYAL: It would, again, be a better case because at least one of the issues that Judge Robertson found wouldn't be there. But, of course, we assert here that Mr. Hamdan has no right to be charged before this military commission both because Article 5 has already been violated of the Geneva Conventions, and as well his right to be present has already been violated in the voir dire. That is, abstaining -- if the only issue were what the prosecution has said, which is that they intend to exclude Mr. Hamdan for two days of classified information at his trial -- and we don't know whether that's going to happen for sure, of course -- that is a stronger case.

But, of course, the abstention test in general in the state system, and particularly in the military is that there must be fairness, independence, and competence, and none of those can be said here. This military commission, unlike *Councilman*, is not set up by Congress and does not have the

structural safeguards in place that *Councilman* found so essential to its abstention rationale.

THE COURT: Counsel, let me ask you the flip side of the same question I asked Mr. Keisler. Why are you opposed to abstention in this case? You're not challenging -- I mean, it's not as if he's going to be released any earlier. You're not challenging the fact of detention. It gives you a chance to prove your case that you argue on the merits and you preserve -- we heard today that you would be able to raise all of your challenges to the commission at the end of the proceedings. You may prevail before the commission and if you do, fine; and if you don't, you can raise the same arguments you're raising today after the commission's ruling.

MR. KATYAL: This is an important question and I have a bunch of things to say about it. The first is the fact that the government can detain Mr. Hamdan -- we don't know that they will -- as an enemy combatant, but the fact that they might be able to, I think, cuts the other way when the government says national security is on the line and the like because, of course, we're not talking as we were in the *Rasul* context of possibly setting someone free with no ability of the Executive to do anything.

And the second thing is that there are three harms to Mr. Hamdan from abstaining right now if this Court were to do so, and that's why we've brought this case in the posture we're brought it.

The first is that Mr. Hamdan has been detained, as I've said, for three-and-a-half years in solitary confinement. You know from the amicus brief of Human Rights First that solitary confinement was largely given up on by the United States for a simple reason in the 19th century; because people went mad. And here we're talking about 10 months of solitary confinement and it took Judge Robertson's order to get Mr. Hamdan removed. And if you do what the government asks, which is dismiss this case, that will have -- there is no guarantee that that won't happen again. And the

only evidence in this record is that Mr. Hamdan is going insane because of the -- insane and potentially incompetent and unable to defend himself at trial because of the uncertainty as to every aspect of these proceedings; what the rules are and the like.

The second thing is, of course, if this Court affirms Judge Robertson, he would then be able to participate in the habeas proceedings that were before Judge Greene and are now pending before this Court. That is, he was initially lumped in with those cases and then he was severed because the government said that Mr. Hamdan's challenge to his detention isn't properly before the Court right now because he is being detained under the President's military order. Affirming Judge Robertson would put Mr. Hamdan back with the general detainees and give him the possibility of release.

And, in addition, there is the annual review board that the Defense Department has set up to review even people they are detaining at Guantanamo Bay and have determined are enemy combatants for release. Mr. Hamdan is ineligible for that proceeding because he is under the President's order.

Finally, and I think this is the most important harm to Mr. Hamdan, it will destroy Mr. Hamdan's trial if you abstain. It's impossible to plan --

THE COURT: And why is that? Usually defendants like an advance peak at the prosecution case. And if you're right on the merits that he shouldn't be tried before the commission, what you're getting is an advance peak before the case is going to be tried before a court-martial.

MR. KATYAL: And the thing that they get, Your Honor, is an advance peak at the defense case, and when there are no rules and you don't know what they are, unlike your state or federal hypothetical, it's a situation that's in incredible flux. It makes it impossible for us to know; do we plea, do we put on a defense and give the government the ability to preview it?

This Court, Your Honor, dealt with exactly this question. Judge Randolph, you in the *Marine Mammal* case a few years ago discussed Chief Judge Ginsberg -- now-Chief Judge Ginsberg's opinion in *Raffedy v. INS* (phonetic sp.). The cite is 880 F.2d 506. In that case, the INS had two different exclusion proceedings. They had a plenary one where you had a variety of rights in place, and then a summary one where you didn't have rights. And Mr. Raffedy was scheduled to be before the Cadillac version -- the plenary proceeding -- but he lied to the INS and went to Syria and was alleged to be a terrorist and a defender of the Palestinian Liberation Organization and the like. And the government said, well he has to go before the INS summary proceeding first, using the argument, Judge Roberts, that you did which is he should -- you know he can get a preview of what the INS says and it's not going to hurt him.

And what Chief Judge Ginsberg said is that while he's loathe to ever admit exceptions to the exhaustion requirement, Raffedy will suffer -- "Raffedy will suffer a judicially cognizable injury in that he will thus be deprived of a substantial practical litigation advantage if he presents his defense in a 235(c) proceeding" -- that's the summary proceeding -- "and the Court later finds the section inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent plenary proceeding."

THE COURT: Well, do you think you're right on your argument today that the Convention applies and bars the commission proceeding?

MR. KATYAL: I do, Your Honor. Yes.

THE COURT: So, don't present your defense. Don't present your defense before the commission.

MR. KATYAL: And that is, of course, the terrible double bind that no one in the court-martial context, no one in the state context faces, because you've had previous adjudications as to what the basic ground rules are. Things like what is the body of law that applies? Here we have none

of this. This is not a system of law. This is a system of rules that change at any time. And the uncertainty makes it impossible.

THE COURT: Was that any less true in the prior cases that have upheld the validity of the military commissions? See, your argument here is sort of blending into a general attack on military commissions per se, and the one thing we know from *Quirin* and *Madsen* is that they're not unconstitutional in the abstract.

MR. KATYAL: In the abstract that is correct, Your Honor. This commission is illegal for the reasons that we have suggested. And it is important I think to note the general rule in military commission cases has always been that you -- that the trial proceedings can be interrupted. They were interrupted in *Quirin*, they were interrupted in *McArdle* (phonetic sp.), they were interrupted in *Yerger* (phonetic sp.). And all three of those cases were cases in which they pre-trial challenged the lawfulness of the commission, and that is what we are doing here.

Indeed, in *McArdle*, the Congress, as I'm sure many of you know, was so worried about the possibility of the Supreme Court adjudicating the issue that they rushed in legislation. They didn't rely on some abstention doctrine to try and get rid of the case on that ground. Nor, did they in *Quirin*. And the reason -- the reason why in *Quirin*, *McArdle* and the like abstention wasn't sought is because, as the prosecutor put it in *Quirin*, the military commission is not competent to judge the lawfulness of the tribunal because it's forcing them to question their Commander in Chief.

THE COURT: But that argument's been rejected in most abstention contexts. You know, there's a state administrative body that the Court's abstaining in favor of; the argument is the administrative agency can't say that it's incompetent or that it's unconstitutionally constituted and that hasn't precluded abstention before.

MR. KATYAL: Absolutely correct, Your Honor. In that context. This is a rather different context because it involves military orders, military discipline, and the facts of -- that a real serious question can a subordinate military officer say their Commander-in-Chief has done something illegal? That's a really rather different question. As *Councilman* itself recognized when it said that we are -- when it said that there were structural safeguards in place that prevent command influences, and here there are none of those safeguards in place. The entire regime is set up by the prosecutor from start to finish.

And this is the second distinction with the other abstention cases. In those cases you have some other branch setting up at least the overall apparatus and the procedures and the like. Here you have none of that. You have no knowledge about what the ground rules are, who --

THE COURT: You say no knowledge. And obviously there's a possibility of a change in the rules; that's alluded to when the rules create the commission. But that can happen in a perfectly ordinary criminal trial, can't it? In other words, the rules of evidence may be in flux and suppose you have a long trial, or even a medium-length trial, the defendant makes decisions about whether to plead and so forth, and there may be a rules -- a change in the rules of evidence or criminal procedure pending which then takes effect in time for -- to apply to part of his trial.

MR. KATYAL: Sure. And usually, Your Honor -- at least as I understand it, the rules that are changed by some other body outside of the prosecution in that circumstance. That is, the federal Congress changing rules of evidence or some other rule-making body. Here you don't have any of that, and you don't have a track record or history of general baseline assumptions. I think when we all walk into a federal criminal proceeding or a state one, we don't think that everything may change --

THE COURT: But you're making it sound as if the particular individual prosecutor in this case and the individual tribunal in this case will just freely change the rules, but these are, what, Department of Defense regulations? What are they, that's set up -- they're a Presidential Order, right?

MR. KATYAL: There's a large Presidential Order of November, 2001 and then Defense Department regulations promulgated by the General Counsel, I believe -- signed by the General Counsel.

THE COURT: So, the kind of identity that you're arguing doesn't really exist. I understand that it's closer than in the ordinary criminal trial context --

MR. KATYAL: Well, I -- as you know, Your Honor, I happen to be a fan of unitary Executive. I generally think that -- you know, that the people who are subordinate are all responsible and accountable to him. And unlike, say, the state context, this is a really different -- there's a different presumption here. The state *Younger* context you presume that the essence of the Madisonian Compromise is that states will be fair and adjudicate proceedings in compliance with federal guarantees --

THE COURT: I just want to get to the Geneva Convention here. As a prelude to that, I notice the government -- a centerpiece of the government's presentation here -- and we heard it in the argument -- was *Johnson v. Eisentrager* and footnote 14 of that opinion which says the Geneva Convention of 1929 is not judicially enforceable. And you don't even cite *Johnson* in your brief. You don't discuss it. Is there any reason for that?

MR. KATYAL: We don't believe, Your Honor, that the Johnson discussion of the 1929 Convention is pertinent to the issue before you today, which is the 1949 Convention, and for two reasons. The first is, the 1949 Convention marked a massive change in understanding that it reflects a protection on individuals, not on states. And --

THE COURT: But what's the basis for that assertion? I mean, the commentary points to changes in Article 6 and 7. I have to say I stared at them and stared at them and they just don't seem to me that big a deal, at least in reference to the question of whether we're talking about individual rights or not.

MR. KATYAL: Your Honor, I think that the fair tenor of the Conventions taken as a whole as opposed to just Article 6 and 7 are characterized that way, and I think most commentators would agree -- the book by Jeffrey Best, for example -- that that's the centerpiece of the argument.

There's something else, Your Honor, about *Eisentrager* that I think is important. *Eisentrager* never raised a claim under the habeas statute that he was treated in violation of the -- that he was in violation of the Constitu -- held in custody in violation of the Constitution, treaties, or laws of the United States. We are. He didn't raise that essential habeas claim.

The claim we make, Judge Randolph, is a much narrower one than the one --

THE COURT: Well, it was raised in *Holmes v. Laird* and -- that claim was raised in *Holmes v. Laird* and we followed *Johnson v. Eisentrager*. One of the best precedents of this Circuit that that footnote in *Johnson* is good law as far as treaties are concerned.

MR. KATYAL: As far as treaties in general are concerned. It is not with respect to the 1949 Convention, which we do believe is different because it was intended to apply to everyone and it couldn't be read -- couldn't have a judicial review provision in it --

THE COURT: You talk globally about the entire Convention, but it seems to me that there's a sequence here, and the first question is, is Article 5 judicially enforceable? Isn't that -- if we hold, for example, that it's not, then we don't have to worry about the rest of the Convention.

MR. KATYAL: I'm not quite sure that's true, because our claim is a *Charming Betsy* claim. It's that the -- we don't stand before you just saying the habeas statute implements the Geneva Convention. Rather, we say that the statutes the government relies on to authorize military commissions, Sections 821 and 836, have to be read consistent with international law and international law guarantees.

So, you don't need to reach in this case the ultimate question is, is the Geneva Convention self-executing. Rather, you only need to say that someone who is being prosecuted in the name of the law of war, unlike *Holmes v. Laird* and the like, has the ability to invoke the Geneva Conventions defensively and to block the prosecution because we --

THE COURT: Let's go back to Article 5. What is it -- what changed from 1929 to 1949 in the -- in Article 5?

MR. KATYAL: I believe the language about competence changed dramatically, and the reason why it changed --

THE COURT: It changed from competent authority to competent tribunal.

MR. KATYAL: Tribunal. And the reason --

THE COURT: Now, does that indicate a change in *Eisentrager*? *Eisentrager* says it's not judicially enforceable. They changed competent authority to competent tribunal. Why does that make it suddenly judicially enforceable?

MR. KATYAL: Our claim isn't the change in that word, Your Honor. I don't believe it makes it judicially enforceable. Our claim for judicial enforceability is that there's an Army Regulation which implements the Geneva Convention, and this is a mandamus case; the government was free to remove the regulation, but now that it's on the books, we have the ability to enforce it. Second, that the Congress just last year reaffirmed the Article 5 provision of the Geneva Convention and said in cases of doubt -- in cases of doubt you should -- you have the right to an Article 5 hearing. In the Ronald Reagan Authorization --

THE COURT: Well, the Army Regulation talks -- doesn't talk about competent tribunal. It talks about a competent authority, and I asked Mr. Keisler is the President of the United States a competent authority.

MR. KATYAL: I don't -- I don't think we should focus just on those words in the Army Regulation. We should focus on the panels that are set up, the questions that are asked, the procedures that are given --

THE COURT: But the President made a global determination that all al Qaeda prisoners are not prisoners of war, right?

MR. KATYAL: Right. And here the question is, is Mr. Hamdan al Qaeda? He says he is not. And that is what the Article 5 hearing is about. That is why we changed, Your Honor, from 1929 to 1949, because there were global class decisions made by the Japanese and Germans that entire swathes of people were not amenable to the Geneva protections. And ever since the 1949 Convention, the consistent position of the American military has been no group denials under the Geneva Conventions.

And even if you look at the sources cited in their brief, they all support this proposition and that is the way everyone around the world has read this as well. And to read it a different way and to give the President on his own the ability to say a class of people is exempt is precisely the change that happened between '29 and 1949, and that's our argument.

The other thing -- the other point about footnote --

THE COURT: But why -- if you're correct about that, the language of the Army Regulation reads the same as the 1929 Geneva Convention, right?

MR. KATYAL: I believe on the word competent authority --

THE COURT: Authority, right. And the 1929 Geneva Convention was interpreted to allow global classifications, which is why this changed in 1949. So, if the Army

Regulation reads the same as the '29, why shouldn't it be interpreted the same?

MR. KATYAL: Because I believe there are other parts of Article -- about AR 190-8 that are violated here with respect to the panel that decides the matters and the like.

THE COURT: I'm just reading the part that you quote in your brief.

MR. KATYAL: I'm sorry, Your Honor. I didn't anticipate that argument because it's not, of course, in the government's brief, but I do believe that AR 190 read fairly as a whole is violated on its terms here and, indeed, the historic practice of the military has been violated as well.

THE COURT: I take it questions about 49 and 50 of the UCMJ go to your co-counsel?

MR. KATYAL: That would be right. Thank you.

THE COURT: Counsel, before you sit down, I wanted to follow up on your argument based on *The Charming Betsy* case. Exactly which laws are you saying could be construed in light of the Geneva Convention?

MR. KATYAL: So, Sections 821 and 836 of our -- of 10 U.S.C. 821 and 836. Eight twenty-one says that it gives the President, according to the government, the authority to prosecute violations of the laws of war, and our contention is that those prosecutions are bound by the laws of war as well. That is, even a statute that doesn't reference international law in it -- the Sherman Antitrust Act, for example -- has to be read -- and this Court has said for 200 years, has to be read consistently with international law. And the contention here is that 821 incorporates the fundamental guarantees of a common Article 3, Article 5, and the like into it, even if the regulation has a different view.

THE COURT: Before you sit down as well, in your treaty argument that because the habeas statute which hasn't changed in quite some time, says treaty in it, that that --your

argument I guess is that creates a right of action to enforce the Geneva Convention.

MR. KATYAL: Your Honor, there are two arguments, and we don't believe you need to reach that delicate question in this case. All you need to say is the habeas statute -- we stand on the word "statutes" and that Mr. Hamdan is in custody in violation of a statute; that is, Section 821 or 836, because he is being held for this prosecution and the prosecution itself violates the laws of war. And so that's the argument.

I understand -- and we make the argument in the alternative that the habeas statute gives him the right because the 1949 Convention, unlike the '29 one, is self-executing and the ratification history on this --

THE COURT: But you agree that it would have to be self-executing. We'd have to find that the mere fact that the habeas statute uses the word "treaties" in it is not enough.

MR. KEISLER: Or this alternative argument. I agree with that. And we don't think you need to reach again that question here. That is, all you need reach is *The Charming Betsy*, and the amicus brief of Christopher Wright, I think, goes into a lot of detail on how this Court in unbroken history of 200 years has read statutes in precisely the way we suggest. The issue is not President versus custom -- the President can abrogate customary international law. Rather, it is that Congress has to be read, when they write a statute, to be consistent with international law.

THE COURT: Okay. Thank you.

ORAL ARGUMENT OF CHARLES D. SWIFT, ESQ.
ON BEHALF OF THE APPELLEE

THE COURT: Good morning.

CMDR. SWIFT: Good morning, Your Honors. May it please this Court, at the inception of Mr. Hamdan's military commission, he was excused before the trial really even got started. During voir dire he was forced, over my objection

and my suggestion that maybe we could seek the compromise measures that the government has suggested; some way to include him that the government has now promised that they will do all of those things, they did none of those things at the beginning of his trial.

THE COURT: That could be completely consistent with the Geneva Convention, right?

CMDR. SWIFT: No, it couldn't, sir. If you take --

THE COURT: Why not? They allow the presentation of in camera evidence -- and this isn't even evidence. It's just voir dire that you're complaining about.

CMDR. SWIFT: The voir dire portion -- I think if you read 105 completely on its whole facially, what 105 was talking about in the in camera position applies to, reading fairly on its whole, was they allowed under 105 the protecting power; i.e., his home state, to come and be present during his trial, to have representatives from the country that he was from; his protecting power to sit there.

Now, in camera taken in context there, it would make absolute sense that if you have your enemies -- not your enemies who are on trial, but your enemies who are going home when this is over, to have them out of portions. They got to observe to make sure that it was fair to satisfy themselves and present anything that they might have on the individual's behalf, but certainly they shouldn't be in here, and that's something we do in military justice all the time, sir, is --you know, the general rule is that military courts, like any other court, are open.

But when, for instance, we're trying a submariner for something that happened on the submarine that involves classified evidence, we excuse the public. The submariner, whether he has the clearance or not, stays. The accused stays, but the public is taken out and we conduct the trial. There is a public interest to an open trial and the accused's interest of

being present. And those are different interests. Completely different interests.

And to point out in the voir dire process, what this meant for him -- Judge Williams, you suggested in *Gordon* in your dissent that this should be a balance of fairness because there was a possibility it was speculative only. That the accused might have something to add to his voir dire in that case; he might think of something to tell the counsel. In the military justice system, this was far different because it involved not only the types of things he might think to tell me; it involved the decision to challenge the member at all. Because challenging a member in Mr. Hamdan's case was not an easy decision.

See, if you challenged him and he left, that was one less vote the prosecution had to get. Under the military system in place that he had to get -- the prosecution had to get two-thirds. When we started with five, that meant that if they got -- they needed four jurors. If I challenge one juror off that and it goes to four members or jurors, then -- now they're down to having to get three. Three guilty votes. If I challenge two of them off and we're down to three, the prosecution only has to get two –

THE COURT: But they replace if you challenge somebody --

CMDR. SWIFT: They do not replace them, sir, and they have not replaced them. So, Mr. Hamdan --

THE COURT: I understand that it's a complicated strategic decision, but I'm not sure how the details of the particular claims or actually what is said on the other side to keep the members of the tribunal on are likely to be ones where the voice of the accused is likely to be very telling.

CMDR. SWIFT: Well, it's actually not the voice of the accused, it's the decision of the accused. It's not my jury or my members. I'm not on trial. He is. And he would have gotten to here and decided, do I think after hearing everything

that this man did, that he's prejudiced against me? Or, am I willing -- do I think that he is still a potentially -- because the only way you would exclude someone under this situation is you have reached an almost 100 percent decision that there is no way they will ever vote for me. At five --

THE COURT: Was the voir dire process set up in such a way that you had no way of consulting the client?

CMDR. SWIFT: None. I was forced to make the challenge without talking to him. I asked for all the accommodations that the government has suggested here today. I asked for the accommodation that maybe we could do a summary, maybe we could contact the person who classified it, and maybe they would make some decisions. All of that was summarily rejected. So, all of the promises that the government has made to this Court today on how this is going to be handled so much better were violated at the very beginning.

This process -- and the reason it was violated was the presiding officer, who does have legal training -- the other two members have no legal training. But the presiding officer read the rule as he had no discretion. He was bound to follow whatever rules were put out. And when the prosecutor says well, this is a rule. The rule is the accused must be gone, then that's it; we're done.

And in this part -- when we're abstaining to that, one's not actually abstaining to the idea of a judicial process wherein we're interpreting. Far different from the military court-martial where the Judge is independent. He's independent by statute, he's independent by training, and his decisions -- he's free to interpret the rules. He's free to decide and balance against the weight of the equities against the accused.

THE COURT: The presiding officer has to be a Judge Advocate, right?

CMDR. SWIFT: What's that, sir?

THE COURT: The presiding officer has to be a Judge Advocate?

CMDR. SWIFT: He does have to be a Judge Advocate, sir. He does have some legal training. Now, however, he does not have the say on what the law is per se. Because the other two non-legally trained members can overrule him on anything and, in fact, all legal decisions are made by them in the same way that this panel -- well, slightly different. The presiding officer does make an initial decision on some; many decisions are made as the group at the beginning the same way this panel does. And to suggest that that panel has the expertise violates the *Noyd v. Bond* rule that was put out by the Supreme Court that the federal court should look to the things that they have the expertise in and the military should look to the things that it has the expertise in. This is, by the composition of the panel and by the questions that are presented, this is not something where the military has expertise per se in this position.

It's also important to note that had Judge -- had the presiding officer at the time agreed with me, he had no power to stop the proceeding. Nope, only the appointing authority can do that; the appointing authority who brought the charges. So, even if he agrees with me, all he can do is send up a request to the appointing authority and say, you know what, I think we have to stop these proceedings until we put into place some balance so that the accused can be present or participate in closed sessions of voir dire. Nope, can't stop it. Has to ask.

THE COURT: You're saying he can't have a recess?

CMDR. SWIFT: He could recess, but he cannot declare that the proceedings cannot continue. It's not his decision. He could recess and ask the appointing authority to decide it, but that is far different, because that is the man writing the rules who brought the charges. That's far different than suggesting that judicial decision making is going on here. It's not.

Now, our --

THE COURT: And that was -- that set up was qualitatively different than the military commissions upheld by the Supreme Court in *Quirin* and *Madsen* and all those other cases?

CMDR. SWIFT: Absolutely, sir. In *Quirin* -- and I disagree, though it's hard to put into context, what really secret information is, but I disagree that this is the greatest security threat we've ever faced. We, throughout our history, have had incredible challenges that the military in this country has met. *Quirin* certainly presented one of those challenges. The *Quirin* saboteurs, by the terms of their trial, had come here to do acts of incredible damage; potentially blow up dams, military facilities --

THE COURT: Weren't they all caught within about 24 hours and locked up?

CMDR. SWIFT: No, they weren't. Actually, some of them had been here for months. The reason they were caught, though --

THE COURT: One of them defected, right?

CMDR. SWIFT: Yes. The reason they were caught was the really important secret information. You see, they had been caught, as Judge Randolph suggested, because one had defected. It wasn't because we had an invulnerable security system. It was because they had a traitor.

Now, that information would be of incredible value to the Third Reich. Incredible value. It would tell them keep trying. This isn't futile. But, in fact, had they heard the information of how they had escaped through the homeland defense in Florida, how they had gone about almost unmolested, they would have known that this is a very viable means of attacking the United States.

For that reason, the sessions were closed. They were considered secret -- even top secret. The eight accused all sat in it. They all participated in their defense. They heard the testimony of their fellow conspirator on how he turned them

in and what had been planned to do. They heard about the national coastline. National security was not the exclusion. That was because the fundamental right that had been set down from the Civil War was that the presence of the accused was essential to have a trial. The military recognized this as much as the civilian courts did; that the presence of an accused at his own trial was scarcely less important than the trial itself.

THE COURT: But in this instance the only episode of exclusion that we have, and as I understand the representation of government counsel the only one that he's aware of, is at the pre-trial voir dire. We're not talking about excluding the accused from the trial proceedings at all.

CMDR. SWIFT: Well, the Supreme Court -- and voir dire, to any trial attorney, is an essential part of it. You find out who your members are going to be, the strategic decisions that will shape the entire trial are made. It is the right of the accused not only to see the witnesses against him, but to see those who are judging him and to understand any biases or prejudice they might have.

Now, certainly there might be need to have closed sessions in making that decision where only the accused is present and can see these things. But there is no national security interest that trumps that right of the accused, especially here, Your Honors, where we don't have a balancing test. We have no rules at all. It's simply per se exclusion.

Now, the government again has suggested that there might be rules that could work around all this. What's important for Your Honors to note is that this time and this place there aren't any. They --

THE COURT: Is that also true of the -- what is the name of that court, the International Court of Criminal Justice tried the -- Milosevic in Bosnia. They didn't have any rules either. They didn't even have any rules regarding punishment.

CMDR. SWIFT: The International Court, Your Honor, did develop rules.

THE COURT: They developed them.

CMDR. SWIFT: Yes, sir.

THE COURT: But at the beginning they had nothing.

CMDR. SWIFT: Yes, sir. And there's two important differences. One, they were all judges and they were truly independent. They saw the statute having come from the world and said we have to develop rules. Another important part of it is one of the rules they developed was the accused had the right to be present. The same rules that we've put in in Iraq for Saddam Hussein's trial as the amicus brief points out, and it makes no sense, Your Honor, to say that we are enforcing international law and the first thing we do at the start of the trial is violate a canon of international law; that the accused is present in his trial.

You know, this is not -- while it is both a U.S. court --

THE COURT: How do we know that that's a canon of international law?

CMDR. SWIFT: Well, what we have is both the -- we have Article 75 of the --

THE COURT: There are certainly legal systems where the accused is not present during all proceedings in other countries.

CMDR. SWIFT: Yes. But this goes to the idea that we are enforcing not the law of Rwanda, not the law of Saudi Arabia. We are enforcing the international law, and to the international law we have --

THE COURT: But how do we discover what the international law is?

CMDR. SWIFT: There are three -- as set out in the Second Circuit's excellent opinion, and I don't have the cite for you regarding the first --

THE COURT: There are legal systems in the world that -- from civilized countries that don't allow cross-examination.

CMDR. SWIFT: That's true. But they balance with other rights, sir. What I was going to say is what we know from international law is: A) we have Article 75 of the first protocol. Article 75 --

THE COURT: That's the one we didn't adopt.

CMDR. SWIFT: That's correct, Your Honor, but we -- at the time we reserved from 73 and 74, which had to do with giving "possibility of terrorist" an absolute right --

THE COURT: I mean, we didn't sign the --

CMDR. SWIFT: -- to POW -- we did not sign --

THE COURT: -- agree to the protocol as a whole. We may have mentioned specific things, but we didn't agree to it, right?

CMDR. SWIFT: Well, we agreed at the time when we -- when we set out, we said we believe that Article 75, the right of the accused to be present, is binding international law. We believe that. We also -- we have the practice of nations in conducting war crimes trials. We have the practice from Yugoslavia, we have the practice from Rwanda, we have the practice from --

THE COURT: There was a voir dire at Nuremburg?

CMDR. SWIFT: What's that --

THE COURT: Was there a voir dire at Nuremburg at which the accused had a chance to challenge the composition of the tribunal against them?

CMDR. SWIFT: I'm not -- I can't answer that question, sir. I don't know. What I do know --

THE COURT: It's not so much -- you keep phrasing it in terms of the right of the accused to be present at trial. What's at issue is the right of the accused to participate in voir dire in addition to the participation of his counsel. And it seems to me the proposition you have to establish is that it is a norm of international law that there be voir dire, that the counsel participate, and even on top of that, that the accused has to be

present, even if it seems that the contribution of the accused at voir dire would be in a case such as this, minimal at best.

CMDR. SWIFT: Well, two things to say to that, sir. First off, it's the tradition in international law that the accused be present for all substantive parts of his trial. Our trial has a voir dire process, which is -- has been held by this country to be a substantive part of the trial, understanding that that informs it, and he's been moved from it.

The other part of it is that the accused's participation was essential. Having done hundreds literally -- well, more than 25 -- hundreds of military court-martials, but 25 contested with members. At every point when we started the challenges, I would turn to the accused and say to him, "Okay, here is the math of challenging someone or not. What is your decision? I can do -- I am your advocate, but I do not make the essential challenges for you. I don't decide whether you'll be tried by a judge or a jury. You decide that. You look at the jury and you decide which members you want. Those are your choices because you are on trial. I'm not on trial. Now, of course, I'll advise you. Of course I'll give you my best opinion, but ultimately, I will ask you your choice."

That's a choice that was taken from Mr. Hamdan. When we sit here and we say it's his trial. We can't substitute the counsel.

THE COURT: If that happened -- counsel, if that happened in a criminal case downstairs, somebody -- a defendant was taken out, the Judge thought the defendant acted up. Taken out in shackles. You couldn't appeal and say, well, you've got to stop the trial, right?

CMDR. SWIFT: Well, first off that's under an --

THE COURT: I mean, you could appeal but --

CMDR. SWIFT: I could appeal, Your Honor.

THE COURT: -- you wouldn't get anywhere.

CMDR. SWIFT: No, sir; I wouldn't. First off, that's under -- I wouldn't get anywhere for several reasons. The

first one is that's already an accepted rule both in international law or -- national that the accused has no right to disrupt the proceedings through his own conduct.

THE COURT: It's contested.

CMDR. SWIFT: It's a contested -- I --

THE COURT: In other words, he said he didn't disrupt.

CMDR. SWIFT: The second part is that under those rules I would have the ability to consult with him on any fundamental decision. He might not be there, but I could leave the courtroom and go talk to him before I made a decision; rights I did not have in this process. I couldn't talk to him about what had happened; I couldn't talk to him about his decisions.

THE COURT: it's a good distinction. Do you have any more --

THE COURT: Yeah, has Hamdan raised implications from Articles 49 and 50 of the UCMJ? As I say, there are two stray sentences in the brief on that subject, but --

CMDR. SWIFT: Certainly. I'd welcome --

THE COURT: -- it's not a developed argument, to put it mildly.

CMDR. SWIFT: Well, yes sir. It really makes -- if one -- the reading suggested by the government is that you should read the Uniform Code of Military Justice in such a way as that you only apply the areas where the commission appears. That doesn't make any sense, both as it would actually play out and when you look at the articles where it appears. The articles where it appears was both criminal statutes, which to become part of the commission jurisdiction since they came from the U.S. common law, you had to mention commissions, and those that required the expension of funds; you had to spend money.

THE COURT: As I understand it, you -- this is sort of back to an interior question, but your argument is that despite the apparently careful distinction throughout the Code

between courts-martial and military commissions, in fact it's all one.

CMDR. SWIFT: It is in this sense. And the reason for that; first, if we were to look at 49 and 50, we would have the absurd situation where if a deposition is taken, despite the fact that it has classified information in it of a witness, Mr. Hamdan gets to be there. But, if we take that same witness and bring him into his trial and have him testify, Mr. Hamdan doesn't get to be there.

THE COURT: Did you make that argument for the District Court?

CMDR. SWIFT: I --

THE COURT: Let's say, a pure Article 49, 50 argument?

CMDR. SWIFT: No, it was not delivered to the District Court at the time. The other part, sir, is that to understand the entire reading, it's perhaps best to look at the original commentators on military commissions, and that's Col. Winthrop and Gen. Crowder. Col. Winthrop said that military commissions were our common law courts of the military that extended necessary jurisdiction. Their difference between the commission and the court-martial wasn't so much in what it looked like or how it acted, but who we could try. A court-martial is statutory. It's limited to its statutory jurisdiction, whereas a commission was at common law a jurisdiction of necessity.

Now, Col. Winthrop went on to say that military commissions still afforded all of the essential rights and protections of a court-martial, but they were substantively basically the same.

THE COURT: You're going to have to wrap it up; your time is way over.

CMDR. SWIFT: Yes, sir. Thank you, sir.

THE COURT: Thank you. Give Mr. Keisler five minutes.

ORAL ARGUMENT OF PETER D. KEISLER, ESQ.
ON BEHALF OF THE APPELLANTS

MR. KEISLER: Thank you, Your Honor. Prof. Katyal said that there are some serious question whether the military commission members, because they are uniformed officers, really could issue rulings that dispute something their commanding officer or the Commander-in-Chief has said. He was followed at the podium by Cmdr. Swift. Cmdr. Swift filed an ex-friend habeas petition against his Commander-in-Chief and he's argued here that lots of things the President has done are unlawful. In doing that he's acted consistently with the highest traditions of the legal profession and his military service. He's done his duty.

The members of the tribunal have their duty, too, and that's the duty to give a full and fair trial and to decide all these issues under the facts and law as they see it and it is quite frequent for court-martials to declare orders of commanding or superior officers unlawful. That's their job, that's their duty.

These issues have been briefed to them, and the military prosecutors haven't remotely suggested that the commission should simply salute their Commander-in-Chief and rule in their favor. They're made the same arguments to the military commission that we're making here, and that includes, of course, the argument that some of these Presidential decisions are unreviewable.

But just as you can disagree with us and rule against it -- us -- they can too, and the fact that they're wearing uniforms and you're wearing robes doesn't make a difference in that regard. And even after that it goes to a review panel of civilians who have been commissioned as generals for this purpose, but civilians from the highest levels of stature within the legal profession: Attorney General Griffin Bell, Secretary Coleman, past and present former -- past and present Judges. All this will give this a very careful look and

issue decisions that I think would be of benefit to the Court if the issue comes back on habeas.

In terms of command influence --

THE COURT: Counsel, could I ask you to turn quickly to The *Charming Betsy* issue? That sort of takes your arguments about judicial enforceability off the board. What's wrong with that argument?

MR. KEISLER: *Charming Betsy* says that if you have a range of permissible interpretations of a statute, you choose the interpretation that would not place the United States in violation of international law. That doesn't apply here. Interpreting Section 821 as we say it should be interpreted, which is to not make Geneva judicially enforceable, doesn't violate any principle of international law unless you regard it as already accepted that as a matter of international law, Geneva must be judicially enforceable.

So, *Charming Betsy* isn't really the issue, and on 821 -- 821 doesn't have the effect that Prof. Katyal has ascribed to it, which is to make a non-judicially enforceable treaty judicially enforceable. Eight twenty-one wasn't in effect when *Johnson v. Eisentrager* was issued and footnote 14 was written, but it's predecessor, Article 15, was in effect and said exactly the same thing. Same reference to laws of war, same reference to preserving the President's authority to use military commissions.

The Supreme Court nonetheless held that Geneva was not judicially enforceable in the course of a challenge to the authority of military commissions. And Article 15 was also in effect when *Madsen v.* --

THE COURT: Well, they didn't really have to reach it once they determined that habeas wasn't available, right?

MR. KEISLER: But they did express that judgment, which would be incorrect, if as Prof. Katyal said Article 15 had made Geneva judicially enforceable.

THE COURT: In *Madsen*, which you were just about to get to, the Court quotes 1486 of Title 10, the reference to the law of war closely akin to 821's, and says that this law of war includes at least that part of the law of nations which defines the powers and duties of belligerent powers.

MR. KEISLER: That's --

THE COURT: I mean, it may well be dictum, but --

MR. KEISLER: But *Madsen* also said that the President's authority to convene military commissions was one that had not been -- whose jurisdiction and procedures had not been prescribed by statute, notwithstanding Article 15. That it was a common law war court with common law authority, and that throughout history, it had been -- procedures and jurisdiction had been developed without regard to statute, and the reason it said that about Article 15 and the reason the same thing is true about 821, which carried Article 15 forward in light of those decisions, is that neither of those provisions was designed to impose substantive restrictions or limitations on the President's authority. The only reason they were enacted was to indicate that the President's pre-existing authority to do military commissions was being preserved notwithstanding the expansion of court-martial jurisdiction in other areas.

And that's what Gen. Crowder's testimony was about --

THE COURT: I'm still not sure what we do with the words "and duties" in *Madsen*.

MR. KEISLER: I don't think *Madsen* meant to say that there was a new statutory restriction. In general, the decisions *Quirin* and *Yamashita* were enforcing a constitutional limitation and *Madsen* carried this forward, that they believed existed on the authority of the President and Congress acting together to establish military commissions. It was clear that Congress had authorized the President to do military commissions generally, but the Court believed there was some outer limitation that the President had to be using

military commissions to try the kinds of offenses that were triable historically by military commissions under the law of war. That's certainly the case here. There's no dispute that the kinds of offenses we're talking about here, unlawful enemy combatants who targeted civilians, are properly triable by military commissions under those procedures.

Finally --

THE COURT: Thank you, Mr. Keisler.

MR. KEISLER: Thank you, Your Honors.

THE COURT: The case is submitted.

(Recess.)

05-184 HAMDAN V. RUMSFELD, ET AL.

DECISION BELOW: 2005 WL 1653046

LOWER COURT CASE NUMBER: 04-5393

QUESTIONS PRESENTED

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?
2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

Cert. Granted 11/7/05

32 C.F.R. §§ 9-17
[Code of Federal Regulations]
[Title 32, Volume 1]
[Revised as of July 1, 2003]
From the U.S. Government Printing Office via GPO Access
[CITE: 32CFR9.1]

TITLE 32--NATIONAL DEFENSE

CHAPTER I--OFFICE OF THE SECRETARY OF DEFENSE

PART 9--PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERROISM

Sec. 9.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under the United States Constitution, Article II, section 2 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (3 CFR, 2001 comp., p. 918, 66 FR 57833), for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this part, the procedures prescribed herein and no others shall govern such trials.

Sec. 9.2 Establishment of Military Commissions.

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

Sec. 9.3 Jurisdiction.

(a) Over persons. A military commission appointed under this part ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused"):

(1) Subject to the President's Military Order; and

(2) Alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

(b) Over offenses. Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

(c) Maintaining integrity of commission proceedings. The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

Sec. 9.4 Commission personnel.

(a) Members--(1) Appointment. The Appointing Authority shall appoint the members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) Number of members. Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) Qualifications. Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer. From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer. (i) The Presiding Officer shall admit or exclude evidence at trial in accordance with section 6(d) of this part. The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Sec. 9.6(b) (3) of this part and for any other reason necessary for the conduct of a full and fair trial.

(ii) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this part, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of

eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this part.

(iii) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(iv) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) Prosecution--(1) Office of the Chief Prosecutor. The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors. (i) Consistent with any supplementary regulations or instructions issued under Sec. 9.7(a), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution''). Prosecutors and Assistant Prosecutors shall be:

(A) Military Officers who are judge advocates of any United States armed force, or

(B) Special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(ii) The duties of the Prosecution are:

(A) To prepare charges for approval and referral by the Appointing Authority;

(B) To conduct the prosecution before the Commission of all cases referred for trial; and

(C) To represent the interests of the Prosecution in any review process.

(c) Defense--(1) Office of the Chief Defense Counsel. The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel. Consistent with any supplementary regulations or instructions issued under Sec. 9.7(a), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel''). The duties of the Detailed Defense Counsel are:

(i) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(ii) To represent the interests of the Accused in any review process as provided by this part.

(iii) Choice of Counsel. (A) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Sec. 9.7(a). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Appointing Authority may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(B) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney:

(1) Is a United States citizen;

(2) Is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court;

(3) Has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;

(4) Has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in DoD 5200.2-R; and

(5) Has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an ad hoc basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in paragraph (c) (2) of this section. The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Sec. 9.6(d) (5).

(4) Continuity of representation. The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

(d) Other Personnel. Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

Sec. 9.5 Procedures accorded the accused.

The following procedures shall apply with respect to the Accused:

(a) The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

(b) The Accused shall be presumed innocent until proven guilty.

(c) A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

(d) At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Sec. 9.6(h) (2).

(e) The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Sec. 9.6(d) (5) and subject to Sec. 9.9.

(f) The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

(g) If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

(h) The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Sec. 9.6(d) (5) and subject to Sec. 9.9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

(i) The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

(j) The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

(k) The Accused may be present at every stage of the trial before the Commission, consistent with Sec. 9.6(b) (3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

(l) Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Sec. 9.6(d) (5) of this part and subject to Sec. 9.9.

(m) The Accused may make a statement during sentencing proceedings.

(n) The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

(o) The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with

Sec. 9.6(b).

(p) The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Sec 9.6(h) (2).

Sec. 9.6 Conduct of the trial.

(a) Pretrial procedures--(1) Preparation of the Charges. The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Sec. 9.4(b) (2) (i).

(2) Referral to the Commission. The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Sec. 9.3(a) and alleging an offense within the jurisdiction of a Commission in accordance with Sec. 9.3(b).

(3) Notification of the accused. The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements. The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be

bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and service of process; obtaining evidence. (i) The Commission shall have power to:

(A) Summon witnesses to attend trial and testify;

(B) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(C) Require the production of documents and other evidentiary material; and

(D) Designate special commissioners to take evidence.

(ii) The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this part. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

(b) Duties of the Commission during trial. The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this part. Grounds for closure include the protection of information classified or classifiable under Executive Order 12958; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses;

intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an ex parte, in camera presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to section 9 of this part, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time.

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

(c) Oaths. (1) Members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in paragraph (d) (2) (ii) of this section.

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

(d) Evidence--(1) Admissibility. Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(2) Witnesses--(i) Production of witnesses. The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(ii) Testimony. Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(iii) Examination of witnesses. A witness who testifies before the Commission is subject to both direct examination and cross-examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may question witnesses at any time.

(iv) Protection of witnesses. The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in paragraph (d) (5) (i) of this section, in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an ex parte, in camera presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other evidence. Subject to the requirements of paragraph (d) (1) of this section concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice. The Commission may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested.

(5) Protection of Information--(i) Protective Order. The Presiding Officer may issue protective orders as necessary to carry out the Military Order and this part, including to safeguard "Protected Information," which includes:

(A) Information classified or classifiable pursuant to Executive Order 12958;

(B) Information protected by law or rule from unauthorized disclosure;

(C) Information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses;

(D) Information concerning intelligence and law enforcement sources, methods, or activities; or

(E) Information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(ii) Limited disclosure. The Presiding Officer, upon motion of the Prosecution or sua sponte, shall, as necessary to protect the interests of the United States and consistent with Sec. 9.9, direct:

(A) The deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel;

(B) The substitution of a portion or summary of the information for such Protected Information; or

(C) The substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer ex parte, in camera, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.

(iii) Closure of proceedings. The Presiding Officer may direct the closure of proceedings in accordance with paragraph (b) (3) of this section.

(iv) Protected information as part of the record of trial. All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed in camera and subsequently withheld

from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

(e) Proceedings during trial. The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not; the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission deliberate and vote on findings in closed conference, the Presiding Officer shall announce the Commission's findings in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross-examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission deliberate and vote on a sentence in closed conference, the Presiding Officer shall announce the Commission's sentence in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(f) Voting. Members of the Commission shall deliberate and vote in closed conference. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the members is required for a finding of Guilty. When appropriate, the Commission may adjust a charged offense by exceptions and

substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot.

(g) Sentence. Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

(h) Post-trial procedures--(1) Record of Trial. Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under paragraph (h) (4) of this section.

(2) Finality of findings and sentence. A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision

thereon pursuant to section 4(c) (8) of the President's Military Order and in accordance with paragraph (h) (6) of this section. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority. If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under paragraph (h) (4) of this section. If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel. The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to section 603 of title 10, United States Code. At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this part or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either:

(i) Forward the case to the Secretary of Defense with a recommendation as to disposition, or

(ii) Return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense. The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under section 4(c) (8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final decision. After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under paragraph (h) (5) of this section shall constitute the final decision.

Sec. 9.7 Regulations.

(a) Supplementary regulations and instructions. The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this part as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this part as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

(b) Construction. In the event of any inconsistency between the President's Military Order and this part, including any supplementary regulations or instructions issued under paragraph (a) of this section, the provisions of the President's Military Order shall govern. In the event of any inconsistency between this part and any regulations or instructions issued under paragraph (a) of this section, the provisions of this part shall govern.

Sec. 9.8 Authority.

Nothing in this part shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this part shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

Sec. 9.9 Protection of State secrets.

Nothing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

Sec. 9.10 Other.

This part is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this part shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this part. Failure to meet a time period specified in this part, or supplementary regulations or instructions issued under Sec. 9.7(a), shall not create a right to relief for the Accused or any other person. DoD Directive 5025.1 shall not apply to this part or any supplementary regulations or instructions issued under Sec. 9.7(a).

Sec. 9.11 Amendment.

The Secretary of Defense may amend this part from time to time.

Sec. 9.12 Delegation.

The authority of the Secretary of Defense to make requests for assistance under section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

PART 10--MILITARY COMMISION INSTRUCTIONS

Sec. 10.1 Purpose.

This part establishes policies for the issuance and interpretation of Military Commission Instructions promulgated pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 66 FR 57833).

Sec. 10.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with 10 U.S.C. 113(d) and 140(b).

Sec. 10.3 Applicability.

This part, and, unless stated otherwise, all other Military Commission Instructions apply throughout the Department of Defense, including to the Office of the Secretary of Defense, the Military Departments, the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities within the Department of Defense, to any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to 32 CFR 9.4(b) (2), to any civilian

attorney who seeks qualification as a member of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4(c) (3) (ii), and to any attorney who has been qualified as a member of that pool.

Sec. 10.4 Policies and procedures.

(a) Promulgation. Military Commission Instructions will be issued by the General Counsel of the Department of Defense (hereinafter General Counsel). Each Instruction will issue over the signature of the General Counsel and, unless otherwise specified therein, shall take effect upon the signature of the General Counsel. Instructions will be numbered in sequence.

(b) Professional responsibility. Compliance with these Instructions shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

(c) Compliance breaches. Failure to adhere to these Instructions or any other failure to comply with any rule, regulation, or Instruction applicable to trials by military commission convened pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," may be subject to appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," punitive measures imposed under 10 U.S.C. 898, and any other lawful sanction.

Sec. 10.5 Construction.

Military Commission Instructions shall be construed in a manner consistent with 32 CFR part 9, and Military Order of

November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Nothing in these Military Commission Instructions applies with respect to the trial of crimes by military commissions convened under other authority. In the event of an inconsistency, the provisions of 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall govern as provided in Section 7(B) of Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Pronouns referring to the male gender shall be construed as applying to both male and female.

Sec. 10.6 Non-creation of right.

Neither this part nor any Military Commission Instruction issued hereafter, is intended to and does not create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Alleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person.

Sec. 10.7 Reservation of authority.

Neither this part nor any Military Commission Instruction issued hereafter shall be construed to limit, impair, or otherwise affect any authority granted by the Constitution or laws of the United States or Department of Defense regulation or directive.

Sec. 10.8 Amendment.

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

PART 11--CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

Sec. 11.1 Purpose.

This part provides guidance with respect to crimes that may be tried by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 66 FR 57833) and enumerates the elements of those crimes.

Sec. 11.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (66 FR 57833) and 10 U.S.C. 113(d), 140(b), and 821. The provisions of 32 CFR part 10 are applicable to this part.

Sec. 11.3 General.

(a) Background. The following crimes and elements thereof are intended for use by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

(b) Effect of other laws. No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or

similarity of particular language in this part as compared to other articulations of law.

(c) Non-exclusivity. This part does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

Sec. 11.4 Applicable principles of law.

(a) General intent. All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

(b) The element of wrongfulness and defenses. Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes in Sec. 11.6. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this part does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such

as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in 32 CFR 9.5(c), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

(c) Statute of limitations. Violations of the laws of war listed herein are not subject to any statute of limitations.

Sec. 11.5 Definitions.

(a) Combatant immunity. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict.

(b) Enemy. "Enemy" includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It

is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

(c) In the context of and was associated with armed conflict. Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

(d) Military Objective. "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

(e) Object of the attack. "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

(f) Protected property. "Protected property" refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

(g) Protected under the law of war. The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are hors de combat or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

(h) Should have known. The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

Sec. 11.6 Crimes and elements.

(a) Substantive offenses--war crimes. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) Willful killing of protected persons--(i) Elements. (A) The accused killed one or more persons;

(B) The accused intended to kill such person or persons;

(C) Such person or persons were protected under the law of war;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The killing took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(2) Attacking civilians.--(i) Elements. (A) The accused engaged in an attack;

(B) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(C) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(D) The attack took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(3) Attacking civilian objects.--(i) Elements. (A) The accused engaged in an attack;

(B) The object of the attack was civilian property, that is, property that was not a military objective;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known that such property was not a military objective; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(4) Attacking Protected Property--(i) Elements. (A) The accused engaged in an attack;

(B) The object of the attack was protected property;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(5) Pillaging--(i) Elements. (A) The accused appropriated or seized certain property;

(B) The accused intended to appropriate or seize such property for private or personal use;

(C) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(D) The appropriation or seizure took place in the context of and was associated with armed conflict.

(ii) Comments. As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

(6) Denying quarter--(i) Elements. (A) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(B) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(C) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(D) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. Paragraph (a)(6)(i)(C) of this section precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy combatants. For example, a remotely delivered attack cannot give rise to this offense.

(7) Taking Hostages--(i) Elements. (A) The accused seized, detained, or otherwise held hostage one or more persons;

(B) The accused threatened to kill, injure, or continue to detain such person or persons;

(C) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. Consistent with Sec. 11.4(b), this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

(8) Employing poison or analogous weapons--(i) Elements. (A) The accused employed a substance or a

weapon that releases a substance as a result of its employment;

(B) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(C) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(D) The accused knew or should have known of the nature of the substance or weapon; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) The "death or serious damage to health" required by paragraph (a)(8)(i)(B) of this section must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).

(B) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(C) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(D) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

(9) Using protected persons as shields--(i) Elements. (A) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(B) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective

from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(10) Using protected property as shields--(i) Elements. (A) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(B) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(11) Torture--(i) Elements. (A) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(B) The accused intended to inflict such severe physical or mental pain or suffering;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Consistent with Sec. 11.4(b), this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(B) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(1) The intentional infliction or threatened infliction of severe physical pain or suffering;

(2) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) The threat of imminent death; or

(4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(C) "Prolonged mental harm'' is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(D) Paragraph (a)(11)(i)(C) of this section does not require a particular formal relationship between the accused and the victim. rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

(12) Causing serious injury--(i) Elements. (A) The accused caused serious injury to the body or health of one or more persons;

(B) The accused intended to inflict such serious injury;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. "Serious injury'' includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

(13) Mutilation or maiming--(i) Elements. (A) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(B) The accused intended to subject such person or persons to such mutilation;

(C) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(D) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(E) Such person or persons were in the custody or control of the accused; and

(F) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(14) Use of treachery or perfidy--(i) Elements. (A) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(B) The accused intended to betray that confidence or belief;

(C) The accused killed, injured, or captured one or more persons;

(D) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(15) Improper use of flag of truce--(i) Elements. (A) The accused used a flag of truce;

(B) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(16) Improper use of protective emblems--(i) Elements. (A) The accused used a protective emblem recognized by the law of armed conflict;

(B) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(C) The accused knew or should have known of the prohibited nature of such use; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. "Combatant purposes," as used in paragraph (a)(16)(i)(B) of this section, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

(17) Degrading treatment of a dead body.--(i) Elements. (A) The accused degraded or otherwise violated the dignity of the body of a dead person;

(B) The accused intended to degrade or otherwise violate the dignity of such body;

(C) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. Paragraph (a)(17)(i)(B) of this section precludes prosecution for actions justified by military necessity.

(18) Rape--(i) Elements. (A) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(B) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Paragraph (a)(18)(i)(B) of this section recognizes that consensual conduct does not give rise to this offense.

(B) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(C) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, an legitimate body cavity search could not give rise to this offense.

(D) The concept of "invasion" is gender neutral.

(b) Substantive offenses--other offenses triable by military commission. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) Hijacking or hazarding a vessel or aircraft--(i) Elements. (A) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(B) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

(2) Terrorism--(i) Elements. (A) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(B) The accused:

(1) Intended to kill or inflict bodily harm on one or more persons; or

(2) Intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(C) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(D) The killing, harm or destruction took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Paragraph (b)(2)(i)(A) of this section includes the concept of causing death or bodily harm, even if indirectly.

(B) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

(3) Murder by an unprivileged belligerent--(i) Elements. (A) The accused killed one or more persons;

(B) The accused:

(1) Intended to kill or inflict great bodily harm on such person or persons; or

(2) Intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(C) The accused did not enjoy combatant immunity; and

(D) The killing took place in the context of and was associated with armed conflict.

(ii) Comments. (A) The term "kill" includes intentionally causing death, whether directly or indirectly.

(B) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial.

Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

(4) Destruction of property by an unprivileged belligerent--(i) Elements. (A) The accused destroyed property;

(B) The property belonged to another person, and the destruction was without that person's consent;

(C) The accused intended to destroy such property;

(D) The accused did not enjoy combatant immunity; and

(E) The destruction took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(5) Aiding the enemy--(i) Elements. (A) The accused aided the enemy;

(B) The accused intended to aid the enemy; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Means of accomplishing paragraph (b)(5)(i)(A) of this section include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(B) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(C) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is

sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

(6) Spying--(i) Elements. (A) The accused collected or attempted to collect certain information;

(B) The accused intended to convey such information to the enemy;

(C) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(B) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

(7) Perjury or false testimony--(i) Elements.

(A) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(B) Such testimony or information was material;

(C) Such testimony or information was false; and

(D) The accused knew such testimony or information to be false.

(ii) [Reserved]

(8) Obstruction of justice related to military commissions--(i) Elements. (A) The accused did an act;

(B) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(C) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(1) There were or would be proceedings before a military commission; or

(2) There was an ongoing investigation of offenses triable by military commission.

(ii) [Reserved]

(c) Other forms of liability and related offenses. A person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense was not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

(1) Aiding or abetting--(i) Elements. (A) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

(B) Such other person or entity committed or attempted to commit the substantive offense; and

(C) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

(ii) Comments. (A) The term "aided or abetted" in paragraph (c)(1)(i)(A) of this section includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(B) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(C) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

(2) Solicitation--(i) Elements. (A) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(B) The accused intended that the offense actually be committed.

(ii) Comments. (A) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed,

however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(B) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

(C) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

(3) Command/superior responsibility--perpetrating--(i) Elements. (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(D) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

(ii) Comments.

(A) The phrase "effective authority and control" in paragraph (c) (3) (i) (A) of this section includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(B) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

(4) Command/superior responsibility--misprision--(i) Elements. (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(D) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

(ii) Comments.

(A) The phrase, "effective authority and control" in paragraph (c) (4) (i) (A) of this section includes the concept of relative authority over the subject matter or activities

associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(B) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

(5) Accessory after the fact--(i) Elements. (A) The accused received, comforted, or assisted a certain person;

(B) Such person had committed an offense triable by military commission;

(C) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(D) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

(ii) Comments. Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

(6) Conspiracy--(i) Elements. (A) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(B) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(C) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

(ii) Comments. (A) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(B) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(C) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(D) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(E) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(F) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(G) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(H) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

(7) Attempt--(i) Elements. (A) The accused committed an act;

(B) The accused intended to commit one or more substantive offenses triable by military commission;

(C) The act amounted to more than mere preparation; and

(D) The act apparently tended to effect the commission of the intended offense.

(ii) Comments. (A) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(B) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(C) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(D) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(E) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

PART 12--RESPONSIBILITIES OF THE CHIEF PROSECUTOR, PROSECUTORS, AND

ASSISTANT PROSECUTORS

Sec. 12.1 Purpose.

This part establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

Sec. 12.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

Sec. 12.3 Office of the Chief Prosecutor.

(a) General. The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

(b) Chief Prosecutor. (1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

(4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," ensuring proper supervision and management of

all personnel and resources assigned to the Office of the Chief Prosecutor.

(5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001,'' Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and all Supplementary Regulations and Instructions issued in accordance therewith.

(6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

(7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

(9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in 32 CFR 9.4(b) (2). The Chief Prosecutor may detail himself to perform such duties.

(10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.''

(11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

(12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

(c) Prosecutors. (1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(3) Prosecutors shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," those set forth in this part, and those assigned by the Chief Prosecutor.

(4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

Sec. 12.4 Duties and responsibilities of the prosecution.

(a) Regular duties. The Prosecution shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Prosecution.

(b) Administrative duties. The Prosecution shall, as directed by the Presiding Officer or the Appointing

Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in his discretion, depart from this guide as appropriate.

(c) Special duties. The Prosecution shall perform all other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

Sec. 12.5 Policies.

(a) Prohibition on Prosecutors serving as Defense Counsel. Judge advocates assigned to the Office of the Chief Prosecutor shall be deemed unavailable for service as Defense Counsel under 32 CFR 9.4(c) (3) (i).

(b) Prohibition on certain disclosures. All Prosecutors must strictly comply with 32 CFR 9.6(d) (5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

(c) Statements to the media. Consistent with DoD Directive 5122.5, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

PART 13--RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL

Sec. 13.1 Purpose.

This part establishes the responsibilities of the Office of Chief Defense Counsel and components thereof.

Sec. 13.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

Sec. 13.3 Office of the Chief Defense Counsel.

(a) General. The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions and shall be comprised of the Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

(b) Chief Defense Counsel. (1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a

military commission appointed pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to 32 CFR part 14.

(5) The Chief Defense Counsel shall inform the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel.

(6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

(7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

(8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in 32 CFR 9.4(c) (2) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel, nor does he form an attorney-client relationship with accused persons or incur any concomitant confidentiality obligations.

(i) The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

(ii) The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

(9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

(10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

(11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," is represented at all relevant times by Detailed Defense Counsel.

(12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with 32 CFR 9.4(c) (3). He shall determine the availability of such counsel in accordance with this part.

(13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with 32 CFR part 9, this part, and 32 CFR part 14, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

(14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

(15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

(c) Detailed Defense Counsel. (1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

(2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of certain Non-Citizens in the War Against Terrorism." In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and

without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by 32 CFR part 9; and comply with the procedures accorded the Accused pursuant to 32 CFR 9.5 and 9.6. Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

(3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

(4) Detailed Defense Counsel shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," those set forth in this part, and those assigned by the Chief Defense Counsel.

(d) Selected Detailed Defense Counsel. (1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

(2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine not to be available because of the nature or responsibilities of their assignments, exigent circumstances, military necessity, or other appropriate reasons.

(3) Consistent with 32 CFR 9.6(b), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

(4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case.

(e) Qualified Civilian Defense Counsel. (1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to 32 CFR 9.4(c) (3) (ii).

(2) Consistent with 32 CFR 9.6(b), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

(3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in 32 CFR 9.4(c) (2).

(4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under 32 CFR 9.6(d) (5).

(5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any

appropriate action consistent with 32 CFR part 9 and this part.

Sec. 13.4 Duties and responsibilities of the defense.

(a) Regular duties. The Defense shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Defense.

(b) Special duties. The Office of the Chief Defense Counsel shall perform such other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

Sec. 13.5 Policies.

(a) Prohibition on certain agreements. No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

(b) Prohibition on certain disclosures. All Defense Counsel must strictly comply with 32 CFR 9.6(d) (5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

(c) Statements to the media. Consistent with DoD Directive 5122.5, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may

communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

PART 14--QUALIFICATION OF CIVILIAN DEFENSE COUNSEL

Sec. 14.1 Purpose.

This part establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4 (c) (3) (ii) in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 Comp., 918, 66 FR 57833).

Sec. 14.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

Sec. 14.3 Policies and procedures.

(a) Application procedures. (1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in 32 CFR 9.4(c) (3) (ii) as further detailed in this part, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

(2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to: Office of the General Counsel, Department of Defense, (Attn: Chief Defense Counsel,

Office of Military Commissions), 1600 Defense Pentagon, Washington, DC 20301-1600. Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in 32 CFR 9.4(c) (3) (ii):

(i) Civilian Defense Counsel shall be United States citizens (32 CFR 9.4(c) (3) (ii) (A)). Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).

(ii) Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court (32 CFR 9.4(c) (3) (ii) (B)). Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(iii) Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct (32 CFR 9.4(c) (2) (iii)).

(A) An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted

or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(B) Further, applicants shall submit a properly executed Authorization for Release of Information (Appendix A to this part), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

(iv) Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures described in Department of Defense Regulation, DoD 5200.2-R, "Personnel Security Program." (32 CFR 9.4(c) (2) (iv)

(A) Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.

(B) Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with DoD 5200.2-R and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully

complies with this part and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel's services are likely to be sought.

(v) Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings (32 CFR 9.4(c) (2) (v)). This requirement shall be satisfied by the execution of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to this part. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (i.e., no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under 18 U.S.C. 1001.

(b) Application review. (1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with 32 CFR part 9 and

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and with this part.

(2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.

(3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," or with this part.

(4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.

(5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

(6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member

of the Civilian Defense Counsel pool on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the Civilian Defense Counsel, or other good cause, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

Appendix A to Part 14--United States of America Authorization for Release of Information

United States of America

Authorization for Release of Information

(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: Any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

_____

Signature (sign in ink) SSN

_____

Date

Appendix B to Part 14--Affidavit and Agreement by Civilian Defense Counsel

Affidavit and Agreement by Civilian Defense Counsel

Pursuant to Section 4(C) (3) (b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 FR 57833 (Nov. 16, 2001) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No. 5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D) (5) or Section 9 of MCO No. 1.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian

Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During the pendency of the proceedings, unless I obtain approval in advance from the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not travel or transmit documents from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. The Defense Team and I will otherwise perform all of our work relating to the proceedings, including any electronic or other research, at the site of the proceedings (except that this shall not apply during

post-trial proceedings detailed in Section 6(H) of MCO No 1).

2. I will not discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team in accordance with this Affidavit and Agreement and other applicable rules, regulations and instructions.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material. Furthermore, no document or material constituting protected information under MCO No. 1, regardless of its classification level, may leave the site of the proceedings.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if

those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/_____

Print Name:_____

Address:_____

Date:_____

State of)

County of)

Sworn to and subscribed before me, by ----------, this ---- day of --------, 20----.

Notary

My commission expires:_____

PART 15--REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL

Sec. 15.1 Purpose.

This part establishes supervisory and performance evaluation relationships for military commission personnel.

Sec. 15.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 Comp., p. 918, 66

FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

Sec. 15.3 Policies and Procedures.

(a) Supervisory and performance evaluation relationships. Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall be subject to the relationships set forth in paragraphs (a) (1) through (a) (9) of this section. Unless stated otherwise, the person to whom an individual "reports," as set forth in paragraphs (a) (1) through (a) (9) of this section, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

(1) Appointing Authority: Any Appointing Authority designated by the Secretary of Defense pursuant to 32 CFR part 9 shall report to the Secretary of Defense in accordance with 10 U.S.C. 113(d).

(2) Legal Advisor to Appointing Authority: The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

(3) Chief Prosecutor: The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.

(4) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Chief Prosecutor and then to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(5) Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

(6) Detailed Defense Counsel: Detailed Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(7) Review Panel members: Members of the Review Panel shall report to the Secretary of Defense.

(8) Commission members: Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

(9) Other personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to 32 CFR 9.4(d), if not assigned to the Office of the Chief Prosecutor or the Office of the Chief Defense Counsel, shall report to the Appointing Authority or his designee.

(b) Responsibilities of supervisory/reporting officials. Officials designated in this part as supervisory/reporting officials shall:

(1) Supervise subordinates in the performance of their duties.

(2) Prepare fitness or performance evaluation reports and, as appropriate, process awards and citations for subordinates. To the extent practicable, a reporting official shall comply with the rated subordinate's Military Service regulations regarding the preparation of fitness or performance evaluation reports and in executing related duties.

PART 16--SENTENCING

Sec. 16.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilty is entered for an offense referred for trial by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (3 CFR 2001 Comp., p. 918, 66 FR 57833).

Sec. 16.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

Sec. 16.3 Available sentences.

(a) General. 32 CFR part 9 permits a military commission wide latitude in sentencing. Any lawful punishment or condition of punishment is authorized, including death, so long as the prerequisites detailed in 32 CFR part 9 are met. Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission. The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer. In determining an appropriate sentence, the weight to be accorded any or all of these reasons rests solely within the discretion of commission members. All sentences

should, however, be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

(b) Conditions of imprisonment. Decisions regarding the location designated for any imprisonment, the conditions under which a sentence to imprisonment is served, or the privileges accorded one during any period of imprisonment should generally not be made by the commission. Those decisions and actions, however, may be appropriate subjects for recommendation to the person making a final decision on the sentence in accordance with of 32 CFR 9.6(h).

(c) Prospective recommendations for sentence modification. A sentence imposed by military commission may be accompanied by a recommendation to suspend, remit, commute or otherwise modify the adjudged sentence in concert with one or more conditions uponwhich the suspension, remission, commutation, or other modification is contingent (usually relating to the performance, behavior or conduct of the Accused). Unless otherwise directed, a decision or action in accordance with such a recommendation will be effected by direction or delegation to the Appointing Authority by the official making a final decision on the sentence in accordance with of 32 CFR 9.6(h).

Sec. 16.4 Sentencing procedures.

(a) General. 32 CFR part 9 permits the military commission substantial discretion regarding the conduct of sentencing proceedings. Sentencing proceedings should normally proceed expeditiously. In the discretion of the Presiding Officer, as limited by the Appointing Authority, reasonable delay between the announcement of findings and the commencement of sentencing proceedings may be authorized to facilitate the conduct of proceedings in accordance with of 32 CFR 9.6(b).

(b) Information relevant to sentencing. 32 CFR 9.6(e)(10) permits the Prosecution and Defense to present information to aid the military commission in determining an appropriate sentence. Such information may include a recommendation of an appropriate sentence, information regarding sentence ranges for analogous offenses (e.g., the sentencing range under the Federal Sentencing Guidelines that could be applicable to the Accused for the most analogous federal offenses), and other relevant information. Regardless of any presentation by the Prosecution or Defense, the military commission shall consider any evidence admitted for consideration prior to findings regarding guilt. The Presiding Officer may limit or require the presentation of certain information consistent with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

(c) Cases involving plea agreements. In accordance with 32 CFR 9.6(a)(4), after determining the voluntary and informed nature of a plea agreement approved by the Appointing Authority, the military commission is bound to adjudge findings and a sentence pursuant to that plea agreement. Accordingly, the Presiding Officer may exercise the authority granted in of 32 CFR 9.6(e) to curtail or preclude the presentation of information and argument relative to the military commission's determination of an appropriate sentence.

(d) Special duties. In cases involving plea agreements or recommendations for certain conditions of imprisonment or prospective sentence modification, the Prosecution and Defense shall provide whatever post-trial information or recommendation as is relevant to any subsequent decision regarding such condition or suspension, remission, commutation, or other modification recommendation associated with the sentence.

PART 17--ADMINISTRATIVE PROCEDURES

Sec. 17.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 Comp., p. 918, 66 FR 57833).

Sec. 17.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

Sec. 17.3 Commission personnel.

(a) Appointment and removal of Commission members. (1) In accordance with 32 CFR part 9, the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

(2) The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with 32 CFR part 9, any such questioning shall be

narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

(3) From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

(b) Military commission security officer. The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

(c) Other military commission personnel. The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

Sec. 17.4 Interlocutory questions.

(a) Certification of interlocutory questions. The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with 32 CFR 9.4(a) (5) (iv), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) Submission of interlocutory questions. The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

(c) Effect of interlocutory question certification on proceedings. While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

Sec. 17.5 Implied duties of the presiding officer.

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with 32 CFR part 9. Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate in camera meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with 32 CFR part 9, may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

Sec. 17.6 Disclosures.

(a) General. Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

(b) Notifications by the prosecution. The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

(c) Notifications by the defense. The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

(d) Evidence related to mental responsibility. If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.